Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

No. 79-1232

CHARLES JACKSON, LONNIE DANIELS, JOHNNY JENKINS, PETER PURSLEY, JEAN SIMMONS, ISSAC REAMS, STEVE BELL, TROTTER JORDAN, and ANTHONY GREENE, on behalf of themselves and all others similiarly situated; THE BLACK STUDENTS' UNION, and unincorporated association; WILLIAM E. PHILLIPS and PHILLIP FRAZIER,

Petitioners,

VS.

S.I. HAYAKAWA, former President of San Francisco State College, BOARD OF TRUSTEES OF THE CALIFORNIA STATE COLLEGE SYSTEM; SAN FRANCISCO STATE COLLEGE; DONALD GARRITY, Vice President for Academic Affairs at San Francisco State College; FRANK DOLLARD, Executive Vice President at San Francisco State College; DONALD SCOBEL, Administrative Assistant at San Francisco State College; EDWARD DUERR, Coordinator of Internal Affairs at San Francisco State College; ORRIN DELAND, Business Manager at San Francisco State College; WILLIAM HARKNESS, Dean of Student Activities at San Francisco State College, and PAUL ROMBERG, current President of San Francisco State College, individually and in their official Capacity,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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February 6, 1980.

SUBJECT INDEX

Pages

I. Opinion Below 2
II. Jurisdiction 2
III. Questions Presented 2
IV. Statutory Provisions Involved 3
V. Statement of the Case 4
VI. Reasons for Granting the Writ 13

1. THE DECISION BELOW VIOLATES DUE PROCESS BY GIVING BINDING EFFECT TO A PRIOR SUIT, CARRILLO ET AL v HAYAKAWA, ET AL WHICH HAS NEVER CERTIFIED AS A CLASS ACTION NOR WAS NOTIFICATION OF THE SUIT EVER MADE TO PETITIONERS 16

2. THIS COURT MUST RESOLVE A CLEAR CONFLICT BETWEEN TWO CIRCUITS – THE NINTH AND DISTRICT OF COLUMBIA RESPECTING ITS PRECEDENCE IN AMERICAN PIPE AND CONSTRUCTION CO. V. UTAH 20

3. IT WAS IMPROPER TO GRANT SUMMARY JUDGMENT WHEN THE FACTS SHOW PRIMA FACIE CASE OF RACIAL DISCRIMINATION .. 25

Conclusion 36

Appendix (Opinion and Judgment of Court of Appeals) ..... App. 1

(Opinion and Judgment of the U.S. District Court, Northern District of California) ..... App. 2

Respondents Blacklist and Accompanying Names ..... App. 3

Declaration of Dr. Peter Pursley ..... App. 4

TABLE OF AUTHORITIES CITED

Cases

American Pipe and Construction Co.v.
Utah, 414 U.S. 538 (1974) 3, 11, 13, 23
In Re Brown, et al. 510 P. 2d. 1017
(Cal. S. Ct. 1073), cert, denied
416 U.S. 950 (1974) 5,7,12,13,22
Wong v. Hayakawa, 464 F. 2d. 1282
(9th Cir. 1972) 5,7,11,12
Carrillo v. Hayakawa (N.D. Cal. June 21, 1969) . 5. 6. 7, 10, 11. 38
Mullane v. Central Hanover B & T Co.
339 U.S. 307, 315-318 (1949) 18
Sovereign Camp v. Bolin
305 U.S. 66 18
McCarthy v. Kleindienst, 562 F. 2d. 1269
(Ct. of App. Dist. Col., 1977) 12, 13, 21
Radio Telegraphers v. Railway Express
Agency, 321 U.S. 342, 248 (1944) 14, 23
Associated Students v. Board of
Trustees of California State
Universities and Colleges, 56 C.A.
3d. 667, 128 Cal. Rptr. 601 (March, 1976) 29
McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 36
Healy v. James, 408 U.S. 169 (1972) 36
Wood v. Strickland, 420 U.S. 308 (1975) 20
Franks v. Bowman Transportation Co.,
424 U.S. 747 (1976) 25

Constitution

Amendments I, V, XIV 3, 12, 13
Amend 25

Federal Statutes

42 USC 1981 et. seq., ... 26

Federal Rules

Civil Procedures
Rule 23 ..... 3.12 ,16,18
Rule 56 24

State Statutes

California Education Code 3,19,28

Text and Periodicals

89 Harvard Law Review 1318, 1402-1416 17
Orrick, Shut it Down! A College in Crisis (1969) 14
Axen, Smith, Pentony, (by any means necessary)
Jossey-Bass 1970 19

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Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioners, CHARLES JACKSON, LONNIE DANIELS, JOHNNY JENKINS, PETER PURSLEY, JEAN SIMMONS, ISSAC REAMS, STEVE BELL, TROTTER JORDAN, and ANTHONY GREENE, on behalf of themselves and all others similarly situated, THE BLACK STUDENTS' UNION, an unincorporated association, WILLIE E. PHILLIPS and PHILLIP FRAZIER, respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 4, 1979.

OPINION BELOW

The opinion of the Court of Appeals, which appears in the appendix hereto as App. 1, *infra*, is reported at 605 F. 2d 1121 (1979). In addition, the opinion of the District Court for the Northern District of California entered on April 20, 1977, appears in the appendix hereto as App. 2, *infra*, but is not otherwise reported.

JURISDICTION

The final judgment of the Court of Appeals was entered on October 4, 1979. A timely application for an extension of time to file this petition was made to the Honorable Justice Rhenquist. The application was approved and an extension given to and including February 8, 1980. The petition was filed within the deadline date of February 8, 1980. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether absentees in a prior uncertified class action were denied due process in that the prior suit was held to have binding effect on their first claim in the instant case.

2. Whether, by the erroneous application of *res judicata* to the instant case the plaintiffs were denied

equal access to the Courts and due process of law.

3. Whether the Appeals Court erred in not following this Court's decision in *American Pipe* and *Construction Co. v. Utah*, 414 U.S. 538 (1974), when it barred plaintiff PURSLEY'S intervention as untimely.

4. Whether, the due process and equal access inherent to Federal Rules of Civil Procedure, Rule 23 is ill-served when, assuming plaintiff PURSLEY is the sole named representative and his claim is held time barred, a timely brought class action is barred as well.

5. Whether Summary Judgment was proper on the issue of racial discrimination in the allocation of student fees just because plaintiff, BLACK STUDENTS' UNION, could only show a reduced allocation rather than no allocation, but did show that black student employees were denied their salaries while white students were not.

STATUTORY PROVISIONS PROVIDED

The First Amendment to the United States Constitution, 42 U.S.C., Sections 1981, 1983 and 1985, Rule 23 of the Federal Rules of Civil Procedure, the California State Education and Administrative Codes, and the California State Penal Code (via pendent jurisdiction).

STATEMENT OF THE CASE

During the school year 1968 and 1969, a significant part of the student and faculty of SAN FRANCISCO STATE COLLEGE, (now California State University, San Francisco) went on strike in protest against what they believed was the college administration's undemocratic and manipulative intervention in student and faculty affairs. At some unspecified time in 1968, and continously through the relevant period, the City Police had a visible presence on the campus along with various plainclothes and other secret police and the FBI's Operation COINTELPRO domestic Spying Campaign, all with the actual approval of the college administration and the encouragement of the Board of Trustees. To deal with the strike and a effort to resume the classroom instructional program, S.I. HAYAKAWA, "acting President", issued a number of regulations, most of which proved ineffective and constitutional appropriateness of which is questionable.

For most of the decade of the sixties, students and faculty had established a "free speech" platform located in the central area of the campus. In this location speeches, rallies and demonstrations were the usual fare. No prior administrations had ever challenged the right of students to rally and protest in this area until S.I. HAYAKAWA became "acting President". For example, the Decree dated December 2, 1968, entitled

"Declaration of Emergency" contained a provision as follows:

> "3. The Speakers Platform shall be available to only those persons of groups who have scheduled the use of the facility with the Dean of Students Office. The use of the facility will be at such times and under such conditions as shall be announced by that office."

Naturally, for the guardians of liberty who typically made use of the platform, this decree provoked even greater use of the platform.

On or about January 4, 1979, the defendant, HAYAKAWA, ISSUED A Decree which imposed an absolute ban on further use of the platform for the period January 6th through January 31st.

The decree prescribed all "rallies, parades, be-ins, hootannies, hoedowns, shivaries, and all other public events likely to disturb the studious in their reading and reflection...The Speakers Platform may not be used and no substitute locations on the central campus are authorized." All persons on the campus would be required to show that their presence was "authorized". As a sweetener, acknowledging the sentiments against police presence on the campus, the decree stated that "the large numbers of police on the campus" would be removed, however, some of the "uniformed officers" will be stationed in classroom buildings,

In the January 4th decree, HAYAKAWA insisted that rigid compliance was his intention, unlike his more lenient treatment of those who disregarded his directive of the prior month

The January 6th decree provoked even greater anger on the part of the students and faculty and broadened the support for the strike.

On January 23, 1969, the leaders of several student organizations consisting of members of racial and ethnic minorities held a rally on the Speakers Platform. Over a thousand of the students and faculty members attended, Shortly after the rally began, a college administrator ordered all to disperse. Concurrently, two large contingents of policemen known as the Tactical Squad established lines in strategic locations which prohibited the attendees from dispersing or otherwise demonstrating around the campus. The Tactical Squad then arrested over 400 students, beat many and hauled them all off in vans which stood ready for that purpose. They were all booked, fingerprinted and photographed. Most were jailed and humiliated for hours and days.

The charges against the students varied. Some were charged with resisting arrest, others for unlawful assembly (California Penal Code, Section 408), breach of the peace (Sections 406 and 407), and failure to disperse (Section 409).

Expectantly a number of civil suits arose from this unconstitutional conduct on the part of the administra-

tion in concert with the City Police. For example, the California State Supreme Court, *In Re Brown*, 510 P.2d. 1017 (Cal. S. Ct., 1973), cert. denied, 416 U.S. 950 (1974), held that the arrests were unlawful as to each and every violation which formed the grounds for the 10 defendants convictions in that case. Subsequent disciplinary actions by the College against many, if not all, arrestees was invalidated in *Wong v. Hayakawa*, 464 F.2d. 1282 (9th Cir. 1972), because the evidence used to discipline the students was held not relevant to the particular student. The plaintiffs in *Wong* also challenged the constitutionality of Hayakawa's Decrees and the absolute ban of January 6 as abridgements under the First, Fourth and Fifth Amendments. However, before decision in that case, Hayakawa rescinded the regulations and thereby successfully mooted the constitutional issue respecting them.

The instant case embraces the issues determined in those cases and, would embrace the issues determined in still another suit, *Carrillo et al. v. Hayakawa*, (Index No 50808, U.S. Dist. Ct., N.D. Cal., June 21, 1969), had that court made a determination to give class status to the plaintiff's claim respecting arrests.

In their original complaint filed in or about March 21, 1972, plaintiffs brought suit in their own behalf and on behalf of others, similarly situated alleging a conspiracy by "threats, intimidation and other unlawful means" to deprive black students at the college of their

"right, privilege, opportunity and the means" to remain matriculated at the college and participate in student activities. Amongst the acts alleged in pursuit of the conspiracy was maintenance by the college administration of a blacklist containing the names of plaintiffs, black and white and others, and another list containing the names of professors and instructors, They sued for a declaratory judgment. In addition, they sought an injunction as to the continuing conduct, as to student elections controlled by the administration and from reappropriation and expenditure of sums allocated to or under the control of the associated students. Further, they included a prayer for damages and urged the Court to place the College in receivership.

On August 15, 1972, they filed their first amended complaint. In this complaint, they specifically identified the class on whose behalf they were bringing the action as all students, student organizations and the faculty. In their prayer they demanded higher damages than in the original suit. They also sought declaratory judgment as to the rights of the various parties in relation to the enumerated conduct of the defendants and "that defendants be enjoined from any further termination of the employment of any faculty members, from any further use of "blacklists", and any further expulsion or suspension of black students";

> "f. That all faculty, administrators, and students terminated pursuant to said conduct be

reinstated with full rights and privileges,"

The Second Amended Complaint, dated February 18, 1975, had as a "first count" allegations respecting the mass arrest of students on January 23, 1969. They alleged that the arrests violated the plaintiffs' rights to peaceful assembly and free speech under the First Amendment, deprivation of right to "freedom from arrest, except under probable cause" as guaranteed by the Fourth Amendment and the Fourteenth Amendment. The second amended complaint also referred to the blacklist but did not name PETER PURSLEY as a representative party. At the time of that complaint, the trial court determined to certify a subclass defined as follows:

> "Those persons whose names appear on a list, originally attached to a memorandum signed S.I. HAYAKAWA, dated February 17, 1969, or on amend d official lists subsequently issued containing additional names, and who were denied employment because their names appeared on said lists and who would have otherwise obtained employment in a college employment program."

The relief they sought prayed for reinstatement of terminated students and faculty.

The First Cause of Action in the Instant Case

In their Third Amended Complaint, filed February 4, 1976, the plaintiffs, JACKSON, ET AL., sought class

certification of their first cause of action. In that complaint, plaintiff alleged that the defendant, HAYAKAWA, and the college administration entered into a scheme and conspiracy, with the City of San Francisco Police Department to deny and deprive the class members their constitutional rights under the First, Fifth and Fourteenth Amendments. These constitutional rights were infringed when on January 23, 1969, HAYAKAWA, summoned the police to the campus where they stood ready and did arrest en masse over 425 students who were peaceably assembled for a rally and demonstration in support of a student strike led by the black students and the BLACK STUDENTS' UNION.

The trial court granted the defendants' motion for summary judgment on the following grounds; That the statute of limitations bars the action since the arrests occurred on January 23, 1969 and the original complaint had not been filed until March 21, 1972. The applicable state statute of limitations for civil rights actions under 42 U.S.C., Section 1983 was held to be 3 years from the time of the 1983 violation. The court held alternatively that under the principle of res judicata the prior suit of *Carrillo v. Hayakawa*, since brought as a class action, bars the instant claim.

The Appeals court upheld the summary judgment on principles of res judicata and saw no need to ascertain the appropriateness of the dismissal by the trial court on grounds of the California statute of limitations.

The Second Cause of Action

In their second cause of action, plaintiff PURSLEY was named for the first time. He and the plaintiffs DANIELS, GREENE and SIMMONS alleged that subsequent to the mass arrest on January 23, 1968, and on February 17, 1969, a black list and amended blacklist of arrestees and supporters was compiled by the defendant, HAYAKAWA, and persons acting under his control and direction. The blacklist was used to punish, bar employment and otherwise deny equal protection to those persons listed. The intention of non-employment was explicit in a cover statement of policy authored and signed by HAYAKAWA which circulated to administrators, professors, college employers and student officers as well as to others outside the academic community. (App. 4) The blacklist included the names of students and faculty members. The trial court denied the claims of DANIELS, GREENE and SIMMONS in that notwithstanding the fact that they were named on the blacklist, they could not show actual loss of employment. With regard to PURSLEY, it held that although denied employment because of the blacklist his claim was barred because he did not become a named plaintiff in time to obtain relief on his individual claim. In particular, the court noted (erroneously under the circumstances) that PURSLEY was informed he would not be rehired on March 6, 1969. The original complaint was filed on March 21, 1972. Therefore, *due to a period of a*

mere 4 days, his claims were held barred under the California 3 year statute of limitations on claims under 42 U.S.C., Section 1983. The court further held that since PURSLEY'S individual claim was barred, the claims of the class members was barred notwithstanding that the class action was timely brought. The Appeals Court affirmed the summary judgment on this cause of action.

The Third Cause of Action

The trial court granted summary judgment on the Third Cause of Action as well. However, the Court of Appeals reversed that decision, based on the awaited decision of *Wong v. Hayakawa, supra.* This cause, therefore, is not included in this petition.

The Fourth Cause of Action

Petitioners did not appeal the trial courts grant of summary judgment in the Fourth Cause of Action. Therefore, this claim is not included in this petition.

The Fifth Cause of Action

In this cause of action, plaintiffs, JACKSON, BELL, DANIELS, FRAZIER, PHILLIPS, REAMS and all members of the BLACK STUDENTS' UNION (BSU) alleged that in violation of Section 23803 of the California Education Code, the defendant, HAYAKAWA and others in the college administration, conspired and schemed to deprive them of their rights to

due process and equal protection under the Fifth and Fourteenth Amendments. In particular they claimed that the defendants disapproved student budget as it related to the BSU thereby reducing the amount of money allocated to it to operate this tutorial program for urban high school youngsters and refusing to disburse salaries to those students employed by the BSU. The unlawful purpose was to punish the BSU for its involvement during the earlier student and faculty strike against the administration. No white student or organizations run by white students similarly involved in the strike were deprived of funds or denied salaries. Therefore, the plaintiff's rights under the Civil Rights Laws, 42 U.S.C., Section 1983, were also violated.

The trial court granted the defendant's summary judgment motion on this claim as well as holding that BSU received "more funds than it was entitled to and in fact... a disproportionately large share of available funds. Therefore, it was not subject to discrimination and its 'expectations' of greater funding is not a claim upon which relief can be granted." The Appeals Court affirmed the summary judgment on this claim:

REASONS FOR GRANTING THE WRIT

According to a Staff Report to the National Commission on the Causes and Prevention of Violence, San Francisco State College, a forerunner in educational innovation and student self-government, became from October,

1968 to April, 1969, "the scene of violence unmatched in the history of American higher education. The campus became the first to be occupied by police on a continuous basis over several months.* A prime consequence of the turmoil was a virtual extinction of the constitutional rights of students and faculty alike by the acting President of the College, SAMUEL I. HAYAKAWA and the college administration.

The rights which the plaintiffs for their first cause seek to vindicate are constitutionally fundamental: the right to free expression and association. On two occasions, December and January, the defendant, HAYAKAWA, promulgated broad and absolute prohibitions against student rallies and demonstrations in hopes of breaking the strike. Those "decrees" were violative of the Constitution on their face. In this light, his bad faith was established *prima facie.* But he did not limit his conduct to these relatively ineffective regulations. He used the disregard by the students of those regulations to summon the San Francisco Police to the campus in the morning in anticipation of the noon day rally and demonstration.

*The report is entitled "Shut It Down!" A College in Crises San Francisco State College, October, 1968 -April, 1969, prepaid by William H. Orrick, Jr. (June, 1969).

During the rally the speakers had addressed those assembled for less than 15 minutes when, at HAYAKAWA'S behest, the police encircled them, beat and arrested them. Plaintiffs maintained that the arrests were in furtherance of a conspiracy and scheme to violate their civil rights and the civil rights of members of their class.

The factual background of this case compels the attention of all lovers of our Constitution. It also exposes a calculated disregard of this Court's existing precedence by the state Attorney General, the Trial Court and the Ninth Circuit of Appeals.

The abrupt dismisal of this meritious case was a tragic blight on the administration of justice and a set back for democracy. It was a flimsy sham and smoke screen decision that was less human and less generous than any legal apology as applied to student civil rights. The courts below have allowed respondents to operate above the law-legibus solutus-and petitioners could find no real security under our Constitution: it was a counterfeit constitution, which means there is no security, no order, no peace and no real freedom for anyone. It is the deplorable truth that the courts below slyly manuevered to politically dispose of this because respondents hold office in government, and summary judgment was used as the legal vehicle that would enable them to escape the penalty for their brutality and lawlessness. The courts below would allow respondent

to "tear up the Bill of Rights" as though our constitution was a document of "octroyee" of the 19th Century Restoration, - a constitution gratiously given to us by the king. This is not a case in an exercise of Zoroastrian theology, the struggle between the forces of darkness and light. There were clear factual disputes and a series of fundamental constitutional questions for a trier of fact. Petitioners were entitled to have "their day in court."

1. THE DECISION BELOW VIOLATES DUE PROCESS BY GIVING BINDING EFFECT TO A PRIOR SUIT, *CARRILLO* ET AL V *HAYAKAWA*, ET AL, WHICH HAS NEVER CERTIFIED AS A CLASS ACTION NOR WAS NOTIFICATION OF THE SUIT EVER MADE TO PETITIONERS

The extension of binding effect of the prior suit to plaintiffs as absentees in the prior suit had no basis because the certified record in *Carrillo* clearly shows that the Court made no finding of class status *either before or after* denying the equitable and declaratory relief sought in that suit.

If plaintiffs were to be bound by the prior suit, than the propriety of class status to that suit should have been adjudicated *prior* to judgment in the merits in order to insulate the class judgment from collateral attack. See Advisory Comm. note, 39FRD 106 (1966) to Federal Rule of Civil Procedure, Rule 23.

This Court still has the task of giving guidelines respecting the substantive due process to be afforded absentee class members in class suit. Cf. 89 Harvard Law Review 1318, 1402-1416. The absence of such direction has caused the Trial Court and the Ninth Circuit Court of the Court of Appeals to misconstrue Rule 23's requirements and in so misconstruing, to deny plaintiffs equal access to court.

Moreover, the decision to deny relief to plaintiffs in *Carrillo* was reached on a record that did not go beyond the pleadings and the affidavits of a number of arrestees and the unrelated affidavits of the defendant police and college security forces.*

There is relatively strong policy in favor of protecting a class action judgment against challenges by class members who did participate in the original action. Otherwise. the benefits of the class action will be lost and what has often been time-consuming and expensive litigation will have settled nothing. Moreover, the procedural requirements for a class suit usually are designed to make certain that the application of *res judicata* and collateral estoppel is fair and equitable. Thus, a

* Those same affidavits were held disqualified as a basis for conviction of arrestees since the vandalism they claimed as the basis for disciplinary action against students since they addressed acts had occuring on days prior to January 23. Cf. In re *Wong v. Hayakawa*, 464 F. 2d. 1282 (9th Cir. 1972).

limitation on collateral attack exists and will not bind members when it can be demonstrated that the representation of his or her interest had been inadequate or that some other basic prequisite to class action treatment (e.g., notice) has not been satisfied, and enforcement of the judgment would be inequitable. Notice to absent class members is crucial to this class action since the members of the class are tenuously affiliated and without it the requirements of due process would not permit the judgment to bind unnotified absentees.

Petitioners were denied due process under the Fourteenth Amendment by the District Court's decision that a "prior uncertified class action," for which petitioners received no notice under FRCP Rule 23, either initially, during or after the trial, effectively bars the instant claim respecting the mass arrests *res judicata*. Although the *Carrillo* complaint contained class allegation, a class was not certified by the court. Under such circumstances, those individuals not a party in *Carrillo* should not be bound by that judgment. They had no notices that a lawsuit was brought on their behalf and they had no notice that *Carrillo* would be binding upon them as to any claim for damages they might have raised, but which was not raised therein. Due process requires that those arrested be given notice that the *Carrillo decision would prevent future lawsuits for monetary claims based on the arrest. Mullane v. Central Hanover B & T Co., In Sovereign Camp v. Bolin*, held

judgment is *res judicata* as to all members of the class who were given the requisite notice and opportunity to be heard therein. Because of the binding effect given to the judgment class action the requirements of procedual due process - notice and opportunity to be heard - are critically important. In absence of the notification standards: form, content and manner required by FRCP 23 it was improper to grant summary judgments based on the operation of *res judicata* as a bar.

Contrary to the assertion of the court below, to bind petitioners to such a narrowly drafted uncertified suit allegedly a class action where no notification was given to potential members of the class certainly violates due process rights and cannot be deemed a (vindication) of the mass arrest. The *Carrillo* decision is not binding on petitions nor does it fulfill any of the other requirements for invocation of *res judicata*.*

*Even the three judge court in *Carrillo* cautioned respondents that the *Carrillo* case was "on the narrow issue" challenging the facial validity of the penal codes which was the basis of the criminal prosecution of the 425 arrested on January 23. In ruling upon the motion, the court did not hear any oral testimony, but, rather considered only affidavits submitted by both sides. The court did not conduct a full evidentiary hearing regarding the bad faith allegation set forth in *Jackson*. Based on the affidavits the court concluded that the arrests did not "plainly" establish such bad faith application of the criminal laws to discourage free speech. Petitioners

2. THIS COURT MUST RESOLVE A CLEAR CONFLICT BETWEEN TWO CIRCUITS -THE NINTH AND DISTRICT OF COLUMBIA RESPECTING ITS PRECEDENTS IN *AMERICA PIPE & CONSTRUCTING CO. V. UTAH.*

By memorandum and order dated August l, 1975 District Judge Robert Peckham made a determination giving class status to the plaintiff's second cause of action. In that cause, the plaintiff's alleged *and the defendant Hayakawa admitted* that on or about February 17, 1969, he authorized, distributed and utilized a blacklist which included the names of all arrestees - students and faculty alike - as well as those members of the academic

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herein must be given the opportunity to present their case fully, including cross-examining respondents' witnesses, who were in violation of the standards set forth in *Wood v. Stickland* 420 U.S. 308; (1945). Since the plaintiffs in *Carrillo* had no such opportunity, *Carrillo* cannot be considered a final decision on the merits to invoke the *res judicata* doctrine as bar to the mass arrest set forth in the first claim herein. *Carrillo* does not in any way preclude a finding that respondents here are not liable for damages pusuant to the standards set forth in *Wood v. Stickland supra.* Under those guide lines the courts below were required to examine *inter alia* the question of whether the California Penal Code sections were unconstitutional as applied in the arrest in question. This question was not resolved in *Carrillo,* but rather in Re *Brown,* 9 Cal. 3d 613 (1973).

community who vocally expressed support of the student strike and were arrested. The purpose of the list was to punish those listed by terminating, refusing to hire or otherwise deny employment at the college to them.

Clearly, the very existence of the list established *prima facie* a violation of the blacklisted persons First and Fifth Amendment rights. A number of those blacklisted were in fact denied employment. On that basis, summary judgment should have been granted to the plaintiffs. Instead, the Trial Court with the affirmance of the Court of Appeals granted summary judgment to the defendants on the grounds that the claim of the only named plaintiff, Instructor PURSLEY, who could establish that he was punished was time barred. It held that PURSLEY'S "informal" efforts to seek reinstatement* did not meet the "timely notice" requirement for equitable tolling to apply. In so holding, the Court did not give full regard to the liberal construction given the doctrine of equitable tolling by the California Courts.

More recently, a case analogous on its facts to the first cause of action in the instant case, but more relevant to the second cause of action on the law, was decided favorable to the plaintiff in *McCarthy v. Kleindienst,* 562 F. 2d, 1269 (Ct. of App. Dist. Col., 1977). In that

*"see Appendix 4 Declaration of Peter Pursley"

case, the plaintiffs sought injunctive relief and monetary compensation for themselves and for a class consisting of all persons unlawfully arrested during a vigil in Washington, D.C.. The suit was filed as a class action on May 1, 1972 based on tortious acts occuring on May 3, 1971. The statute of limitation for the tort was undisputedly recognized as one year. Thus the plaintiffs filed their suit only two or three days prior to the running of the statute. A decision on the defendant's motion for a summary judgment was stayed for nearly three years while the Trial Court awaited a ruling by the Court of Appeals respecting the same issue in a related case.*

*In the instant case, two other related cases were pending in the state court which would be determinative of issues in the instant case. Cf. *In Re Brown*, et al. on Habeas Corpus, wherein, respecting the first cause of action, the California Supreme Court stated:

There is no substantial evidence sufficient to justify a finding by the jury that the petitioners or any of them assembled with the purpose of doing an unlawful act and separated without doing it or advancing toward it. An unlawful act within the meaning of Section 407, as the Attorney General concedes, means criminal conduct prohibited by state law. The evidence is such that a jury would be required to find either that the petitioners did not assemble to do an unlawful act or that they did so assemble and that they accomplished the unlawful act or advanced toward it. This is because the only evidence that they assembled to do an unlawful act is their presence at and conduct during the demonstration; such

When the Court of Appeals ruled in the related case favorable to plaintiffs in *McCarthy*, plaintiff then moved to have their action certified as a class action. The Court denied certification. The following day, 266 arrestees sought to intervene. The Court held their intervention untimely. On appeal, the Court of Appeals acknowledged as critical precedent on this issue this court's decision in *American Pipe and Construction Co. v. Utah, supra.* In that case, this Court stated:

> " We are convinced that the rule most consistent with federal class action procedure must be that that commencement of class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action". 414 U.S. at 553-54.

This court concluded that the statute of limitations are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories faded, and witnesses have disappeared." 414 U.S. at 554, quoting Order of *Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 348 (1944).

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presence of conduct cannot logically furnish an inference that they assembled to do an unlawful act and at the same time an inference that they did not advance toward it or accomplish it. 510 P. 2d. 1017 (Cal., June 18, 1973), Cert. denied, 416 U.S. 950 (1974).

In holding that Pursley did not meet the "timely notice" requirement for the doctrine of equitable tolling to apply, the courts below wholly disregarded the doctrine of equitable tolling as construed by the California courts.

In holding that "Pursley himself had no administrative remedies...the only avenue open to him personally was the courts", the Court of Appeals has embraced a policy which invites aggrieved faculty members to bring claims involving questions of qualifications to teach directly to court and which discourages such persons from seeking academic administrative redress of grievances. Such a policy toward faculty claims which do not involve Title VII of the Civil Rights Act of 1964 as amended is highly questionable for the following reasons: such a policy contravenes the doctrine of exhaustion of administrative remedies which is especially appropriate for academic exhaustion in institutions of higher education; such a policy is highly inconsistent with the broad and longstanding rule of judicial non-intervention in academic affairs; and such a policy discourages individual faculty and institutions from pursuing administrative resolution of academic disputes in cases where it could be said that established formal grievance procedures are imperfect.

Even assuming Pursley's claim was barred by the statute of limitations, the class claim should not have been dismissed. As to this claim, a class was certified on

August 4, 1975. The courts below have not responded to petitioners argument in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976) where this court held that although the named representative of a class may no longer have a personal interest in the outcome of litigation in a certified class, "...the cause of unnamed persons described in the certification acquired a legal status separate from the interest asserted by the named representative." The court has dismissed a certified class designed to protect the rights of those persons who were denied employment because of the usuage of the blacklists memos.* However, if this court resolves the clear conflict between two circuits - the Ninth and the District of Columbia respecting its precedents in *American Pipe & Construction Co. v. UTAH* both the name representative and the class claims will survive.

3.IT WAS IMPROPER TO GRANT SUMMARY JUDGMENT WHEN THE FACTS SHOW PRIMA FACIE CASE OF RACIAL DISCRIMINATION

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*The courts below did not comply with FRCP 23(e) providing individual notice to all members of the class before a dismissal. Individual notice to all members of the class was mandatory and this is just another example where the court has once again misconstrued the application of Rule 23.

There was sufficient evidence of disparate treatment of those black students employed by THE BLACK STUDENTS' UNION to show *prima facia* a genuine issue of fact as to the defendant's intent in reallocating the student budget to support a trial on the merits.

Respondent brought this action to redress deprivation of rights guaranteed by 42 U.S.C. 1981 et, seq. and the Fifth and Fourteenth Amendments to the United States Constitution. 42 U.S.C. 1983 the Civil Rights Act of 1871 also known as the Ku Klux Klan Act was passed pursuant to the Fourteenth Amendment, which provides that:

> No state shall make or enforce any law which shali abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, property without due process of law;

Likewise, 42 U.S.C. 1983 provides:

> Every person, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or cause to be subjected, and citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by

> the constitution and laws, shall be liable to the party injured in an action at law. suit in equity. or other proper proceeding for redress.

Appellants allege that upon the termination of the receivership punitive guidelines were imposed on the student body government by respondent.

The Associated Student organization sets the stage for student politics at San Francisco State University. It is a non-profit California corporation organized for the purpose of providing a student government at the campus to engage in educational and charitable programs and activities for the benefit of its members, the students at San Francisco State. The president of the Associated Students and all members of the Student Legislature are freely elected by the students at San Francisco State at an annual election, traditionally held in the spring.

Articles II, Governmental Organization, Section 1, provides for a Board of Directors ultimately responsible for the maintenance of this association as provided for in the Articles of Incorporation, which shall meet at least once annually for the purpose of conducting business appropriate to the Articles. The Board of Directors control the employment of students of the Associated Student Government. It composes of nine voting members, one of whom is a faculty member and another ia a representative of the university administration.

At the commencement of the Fall semester of 1970. The Black Students' Union, like other clubs and sororities, satisfied the statement of purpose to qualify as a student body organization. It was a bona fide campus organization that was officially registered with the Dean of Students. However, respondents maintained that because BSU participation in leading the student faculty strike the Associated Students would no longer be able to employ Black Students' Union members.*

The administration appears to have had a twofold purpose in its direct interference in the Associated Student organization, student body organization under the California Education Code, Sections 1, 23803, 24054, 42401 and 42402. Those purposes were to direct student funds to less controversial student organizations notwithstanding that the programs operated by those organizations - tutorial for urban youngsters of high school age and remedial reading - were basically uncontroversial. Thus, the administration pressed for recogni-

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Exhibit 2 in the First Amendment Complaints from Nancey Schroder Chairman of the Finance Committee explain to petitioners the reason why minority students were being prohibited from employment positions. in addition, answer to interrogatories of Associated Student President Jon Twichell shows complaints that respondents were using double standards as it related to the employment of black students.

tion of athletics and the arts as the basis for student fee allocations. Cf. *Associated Students vs. Board of Trustees of California State Universities and Colleges,* 56 C.A. 3d. 667; 128 Cal. Rptr. 601 (March 29, 1976). The other purpose was an expectation that the BSU's political effectiveness could be diminished if not extinguished if the community-oriented programs which made the organization popular amongst students and faculty members could be curtailed or eliminated. In pursuit of this latter purpose, it withheld the salaries of the black students employed in those programs. White students employed in programs operated by white operated organizations were not similarly treated.

In the Fifth Claim, appellants allege that respondents, illegally and in a discriminatory manner, deprived certain black students and the members of the Black Students Union salaries for which they were entitled pursuant to the Associated Student Budget for the School Year September 1970-71. In particular, Petitioners have contended that the Twichell Administration were the "appropriate student officers" under state law that was responsible for the allocation of student funds for the academic year 1970-71. Such student body officers refused to comply with the discriminatory guidelines imposed on the student body organizations and did employ members of the Black Students Union. Petitioners were hired and performed the work within

their program in their designated position from September to December, 1970. They were not, however, compensated for the work performed as were the white students similarly situated. Respondents did illegally and without authority misapproriate student fees, in order to divert the official allocation of monies from black students employed in the Associated Students budget 1970-71. The strategy was adopted to prevent the programmatic participation and employment of black students union members in retaliation for leading the strike two years prior.

Table 1 below shows the differential treatment of black and white students employed by the Board of Directors of the Associated Students program for the Fall semester of 1970. Black Students Union members Bell, Daniels, Frazier, Phillips and Reams were active in the BSU during and after the strike. This table supports the BSU allegation that the respondents applied double standards and that from the period of September, 1970 through December, 1970 the respondents refused to compensate the black employees for the work they performed that was similiar to the work performed by white students. The table shows that of the $197,959.00 mandatory fees made available to the student body government, approximately $17,884.00 was allocated for those students employed in programs categorized as "Associated Student Programs," which were the pro-

grams developed to provide services to the general student body. Of this $17,884.00, the balance sheet ending December, 1970, which was a part of interrogatory IV C thru C6 pp 13-14 submitted by respondent DELAND, shows that of the $11,160 spent for white student employment at the end of the semester, approximately $3,623.40 had been spent on the employment of white students while comparatively disparate treatment was given to black students, as the same balance sheets show that of the $6,724.00 allocated for the employment of black students, approximately $ -0- was expended by the end of the semester.

TABLE I

Associated Students Programs

Employment Title	Race	Student Government Allotments	Balance Sheet Expenditures Dec. 1970
1. Communication Dir.	White	$1,612.00	$644.40
2. Performing Arts Dir.	White	$1,612.00	$796.80
3. Child Care Dir.	White	$1,612.00	$675.60
4. Students Service Dir.	White	$1,612.00	$614.40
5. Foreign Students Dir.	White	$1,900.00	$595.20
6. Draft Counselor	White	$1,200.00	$297.00
7. Draft Counselor	Black	$1,200.00	-0-
7 & 8. Legal Fundraisers (2)	Black	$2,616.00	-0-
10. Legal Referral	Black	$1,600.00	-0-
11. Proposal Writers	Black	$1,308.00	-0-
Total White Employment	6	$11,160	$3,623.40
Total Black Employment	5	6,724	-0-

Total Employment	11	$17,884.00	$3,623.40

Source: Evidence obtained from answer to respondent Delands interrogatories II No.2 A p.6, Q p.11. Interrogatory IV No.1 A thru C6 pp 13-14, Interrogatory No. IV No.2 A thru B(1) p. 15, and answer to respondent Harkness's interrogatories III C thru D(1) p.6, Interrogatory V A thru D pp 9-10, Interrogatory VI A thru R p. 10-14. Plus, the affidavits of Black Students Union members Phillips, Frazier, Daniels, Bell, Reams submitted with the original complaint.

Table 2 below: The California Administrative Code, Article 4, entitled "Student Body Organizations," provides for payment of employment for services in connection with the general administration of student fee programs pursuant to applicable salary schedules. This table proves the number of student officers who were employed by the student government. It includes a total of seven, two of whom were black and were not compensated for the work they they performed for the period of September, 1970 - December, 1970 as the white students were. Once again we see the disparate treatment given to black students during this period; such differential treatment between black and white students in employment became the basis for the BSU allegation of racial discrimination.

TABLE 2
Employment of Associated Student Officers

Employment Title	Race	Student Government Allotments	Balance sheet Expenditures Dec. 1970
1. Communications Dir.	White	$1,612.00	$644.40
2. Performing Arts Dir.	White	$1,612.00	$796.80
3. Child Care Dir.	White	$1.612.00	$675.60
4. Foreign Student Dir.	White	$1,900.00	$595.20
5. Student Activities Dir.	White	$1,612.00	$614.00
6. Tutorial Coordinator	Black	981.00	-0-
7. Tutorial Clerk Typists	Black	$ 981.00	-0-
Employed Student Officers:			
Total white employment	5	$8,348.00	$3,326.00
Total black employment	2	$1,962.00	-0-
Total Employment of Officers	7	$10,310.00	$3,326.00

Source: The same sources of data compiled from Table 1, in addition to the affidavits of Black Students' Union members Donald Craig and Scottie Dawson attached to the original complaint.

Table 3: At the commencement of the Fall semester, 1970, the first persons employed are the Associated Students staff who do the administrative work for the student body organization. This table shows the disparate treatment of black student Charles Jackson, who was employed by the student government, but the administration would not allow this Black Students' Union leader to receive his salary as did the white students who were similiarly situated.

TABLE 3

Associated Student Staff Employees

Employment Title	Race	Student Allotment	Expenditure Bal. Sheet Dec.70
1. Administrative Assistant	White	$2,280.50	$1,892.30
2. Secretary	White	$5,349.25	$1,566.61
3. Coordinator of Student Programs	Black	$2,847.60	-0-

Source: The information and data compiled in Table 1, in addition the affidavit of appellant Charles Jackson of the original complaint

Respondents failed to show that these factual issues were not in dispute. They made reference to certain vague answers to interrogatories which show that funds were allocated to BSU members as shown in Tables 1, 2 and 3, but they failed to demonstrate their significance in connection with the BSU allegation of the double standards in employment. It is the burden of the moving party to present information that clearly demonstrates that there is no factual dispute regarding the matter upon which summary judgment is sought. It is often said that the motion must show "that there is no genuine issue as to any material fact" (see Federal Rule 56c.) Here the moving party and the courts below failed to address themselves to the issue of racial discrimination in employment. Summary judgment is a harsh method of deciding this case. It denies petitioners their day in court.

The courts below have exhibited a steadfast determination not to address the actual issues raised in the Fifth Cause of Action. Instead, they urge that discrimination cannot take place where some benefit has been received by a minority group. Discussing hypothetical situations that bear no relevance to the issue raised by petitioners. In support of the motion for summary judgment, the court referred to general answers to interrogatories relating to the budgets and never did cite a specific interrogatory. The court did not address itself to the issue of racial discrimination in employment. We do not believe that these factual issues can be resolved by reference to general exhibits attached to answers to interrogatories. Respondent did not satisfy their burden of showing the absence af any genuine issue of material fact, and were not entitled to summary judgment. Neither the Court below nor respondents have considered that petitions, were hired by the student government officials as were the white students similarly situated and as affirmed by the student budget of September, 1970 - December, 1970, performed work from September to December of 1970 just as did their white counterparts hired by the student organization. Yet, only these black students each of whom were members of the Black Students Union were

not paid for the work they performed. The failure to pay petitions is no less illegal and no less discriminatory because the Black Students Union received funding.

To grant summary judgment in this instance is to evade important fundamental constitutional issues of due process and equal protection rights, and widely departs from the accepted course of judicial proceedings for granting summary judgment motions.

> A genuine issue of fact therefore existed respecting the motivation of the College Administration for the disparate treatment of black students Cf. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
>
> Even assuming the disparate treatment was retaliatory, it constituted an abridgement of the black students constitutional rights under the First, Fifth and Fourteenth Amendments. Cf. *Healy v. James*, 408 U.S. 169, 198 (1972).

CONCLUSION

For these reasons, a writ of certiorari should be granted.

APPENDIX 1

OPINION IN THE APPEAL FROM THE UNITED STATES DISTRICT COURT TO THE NINTH CIRCUIT COURT OF APPEALS

Before: TRASK and ANDERSON, Circuit Judges, and WYATT, District Judge.

ANDERSON, Circuit Judge:

This civil rights case arose from the campus turmoil which occurred at San Francisco State College (now known as California State University, San Francisco) in late 1968 and early 1969. The district court granted summary judgment in favor of the defendant college officials. The plaintiffs (a former instructor and students at the college) appeal, raising questions involving the statute of limitations, res judicata, and the sufficiency of their pleadings. We affirm in part and reverse in part.

BACKGROUND

In the fall of 1968 the Black Students' Union initiated a student-faculty strike at San Francisco State College (College). On January 23, 1969, there was a rally

had been imposed earlier by S.I. Hayakawa, the then President of the College. After the rally had begun, one of the College officials attempted to have the crowd disperse. A San Francisco police officer then informed the crowd that the meeting was unlawful and ordered everyone to leave the area. After these warnings were ignored, the police arrested over four hundred people. All of those arrested were charged with violations of California Penal Code §§ 408 (unlawful assembly), 409 (failure to disperse), and 415 (disturbing the peace).

A number of suits were filed as a result of these arrests and the disciplinary proceedings which were conducted by the college. 1/ In *Carrillo v. Hayakawa*, No. C-50808 (N.D. Cal. June 27, 1969), a declaratory judgment action was filed on behalf of all those arrested, challenging both the constitutionality of the state statutes under which everyone was arrested, and their application. A three-judge federal court rejected both arguments. There was no appeal. The district court held the statutes were not unconstitutional on their face and also were not enforced in bad faith so as to discourage plaintiffs from exercising their First Amendment rights. In *Wong v. Hayakawa*, No. 50983 (April 24, 1969), the disciplinary proceedings conducted by the College were challenged. The district court found that the arrested students were given notice and a sufficient hearing to meet procedural due process notice and hearing requirements. It found, however, that due process was

violated in the limited instance where the decision to discipline was based solely upon a police report that did not show any evidence of misconduct on the part of the plaintiffs. The court then issued an affirmative injunction, ordering the University to expunge from plaintiffs' school records all reference to disciplinary action and to reinstate plaintiffs as students. The court also suggested that the same be done for all students who were disciplined solely on the basis of the police report. This court, on appeal, affirmed the order of the district court, *Wong v. Hayakawa*, 464 F.2d 1282 (9th Cir. 1972), *cert. denied*, 409 U.S. 1130 (1973).

The present action was originally filed on March 21, 1972. The first complaint was filed by one former black student and two black student organizations. Amended complaints adding plaintiffs and new claims were subsequently filed. It was determined that the action might be maintained as a class action in respect of the second of the five claims, but not otherwise (Fed. R. Civ. P. 23(c)(1)). The court below granted summary judgment on all five claims of the Third Amended Complaint which had been filed on December 17, 1975.

The plaintiffs appeal from the adverse judgment on four of their claims. One claim involves the allegation that the mass arrests were unconstitutional. Another deals with a blacklist circulated at the College which barred all those arrested from employment. The third claim stems from the College disciplinary proceedings

against those arrested. And the final claim on appeal involves allegations by black students who allegedly were not paid for work performed for the College. Since each claim implicates different issues, we address each separately.

DISCUSSION

Standard of Review

In reviewing the summary judgment granted by the court below, this court will affirm the judgment only when it appears "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The record and the inferences derived therefrom are reviewed in the light most favorable to the non-moving party. *Great Western Bank & Trust v. Kotz*, 532 F.2d 1252, 1254 (9th Cir. 1976); 10 Wright and A. Miller, *Federal Practice and Procedure* (West 1973), Section 2716.

Mass Arrests

This, the first claim, is based on the arrests of the people who attended the campus rally on January 23, 1969. Plaintiffs Greene and Simmons brought it as a class action on behalf of all those who were arrested at the rally. The essence of this claim is the allegation that the College officials, along with the San Francisco

Police, engaged in a conspiracy to deprive the plaintiffs of their First Amendment rights by having them arrested. In turn, this is dependent upon the implicit assertion that the statutes under which the arrests were made (§§ 408, 409, and 415) were applied without good faith and for the purpose of depriving plaintiffs of their First Amendment rights.

The court below granted summary judgment on this finding that it was either barred by the statute of limitations or res judicata. Because we find ample grounds to support summary judgment based on principles of res judicata, we do not decide whether summary judgment was appropriate under the alternative ground of the statute of limitations.

In *Carrillo v. Hayakawa*, No. C-50808 (N.D. Cal., June 27, 1969), a three-judge federal court rejected a similar challenge to the validity of the mass arrests. The plaintiffs in *Carillo* brought their suit on behalf of themselves and others similarly situated challenging the constitutionalty of the January 23 arrests. The court found that the arrests under §§ 408, 409, and 415 had not been conducted in bad faith.{

Under the principles of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. *Parklane Hosiery Co. v. Shore*, ____*U.S.*____, *58 L.Ed.2d 552, 559 n.5 (1979); Hooker v. Klein*, 573 F.2d 1360, 1367 (9th Cir. 1978), *cert. denied*, 439 U.S. 932 58

L.Ed.2d 327. On appeal, the plaintiffs argue that *Carrillo* 3/ did not involve either the same cause of action or the same parties. 4/

The plaintiffs concede that *Carrillo* presented and decided the issue of whether the California criminal statutes which were used in the mass arrests were applied unconstitutionally and in bad faith to discourage the First Amendment rights of free speech and assembly. Nonetheless, the plaintiffs contend that the question of whether the California criminal statutes "were unconstitutional as applied to the arrests in question" was not resolved in *Carrillo*. We are unable to perceive any meaningful distinction between the issue decided in *Carillo* and the issue presented in the present case. The rights sought to be vindicated remain the same, the passage of the years has not altered their character in any way. Both cases arose out of the mass arrests which occurred on January 23, 1969. Although damages are sought here, whereas declaratory relief was sought in *Carrillo*, the issues are identical. *Cambist Films, Inc. v. Duggan*, 475 F.2d 887, 890-891 (3d Cir. 1973) (Van Dusen, J., concurring). Both cases involved the question of whether the defendants had applied the California criminal statutes in bad faith in violation of the constitutional rights of those arrested.5/

Plaintiffs argue that the parties to the *Carrillo* suit are not the same as those involved in the present case.

They claim that *Carrillo* involved different plaintiffs. 6 Although the named plaintiffs may have been different, we otherwise disagree with this contention. Initially, courts are no longer bound by rigid definitions of the parties or their privies for the purposes of applying collateral estoppel or res judicata. *See Montana v. United States, ____U.S.____, 59 L.Ed.2d 210, 216-218 (1979); and Green v. Ancora-Citronelle Corp.*, 577 F.2d 1380, 1383-1384 (9th Cir. 1978). *Carillo* was brought on behalf of all those who were arrested on January 23 at the College. It was brought as a class action and treated by the court as a class action. 7/ Virtually all of those arrested were represented by counsel in the *Carrillo* case. 8/The plaintiffs fail to raise any other arguments as to why this claim should not be barred by res judicata. *See Montana, supra*, 59 L.Ed.2d at 222-223.

Based on the principles of res judicata, we conclude that summary judgment was properly entered on plaintiffs' first claim.9/

The Blacklist

The second claim for relief is based on the blacklist. Hayakawa had a list of all those who had been arrested prepared and circulated throughout the College. In an attached cover letter, signed by Hayakawa, it was explained that anyone whose name appeared on the list would thereafter be ineligible for employment at San Francisco State.

This claim was brought on behalf of all those whose names had appeared on the blacklist and who had been denied employment as a consequence of such listing. Only one named plaintiff, Peter Pursley, was found to have standing. Pursley was employed as a psychology instructor in the fall of 1968, but was not rehired for the following semester. Pursley did not become a plaintiff until December 1975.

The court below found that Pursley's claim was barred by the statute of limitations since he was notified that his employment was terminated on March 12, 1969, and the present action was not filed until March 21, 1972.

Since §1983 does not contain its own statute of limitations, federal courts look to the state statute of limitations which applies to the most similar state cause of action. *Bradshaw v. Zoological Society of San Diego*, 569 F.2d 1066, 1068 (9th Cir. 1978); *Briley v. State of California*, 564 F.2d 849, 854 (9th Cir. 1977). When a §1983 cause of action is brought in California, §338 (1) of the California Code of Civil Procedure applies.
Bradshaw, supra 569 F. 2d. at 1068; *Briley, supra* 564. F. 2d at 584. This provides for a three year limitation 854. This provides for a three-year limitation period.

Pursley received notice of the termination of his employment on March 12, 1969, and the present action was filed on March 21, 1972. At first glance it appears that his action is time barred. However, Pursley's

department chairman filed an administrative grievance on Pursley's behalf in an attempt to have him reinstated. The final disposition of this informal proceeding did not occur until August 12, 1969. Plaintiffs argue that this administrative procedure tolled the statute so that the period ran until August 12, 1972.

Although federal courts borrow state statutes of limitations in §1983 actions, there is some confusion as to whether state or federal law determines when the claim accrues and whether the statute is tolled. *Bradshaw, supra*, 569 F.2d at 1068; and *compare Briley, supra*, 564 F.2d at 854-855, *with Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), and *William v. Walsh*, 558 F.2d 667 (2d Cir. 1977). We need not address this question because the result reached here would be the same under either California or federal law.

Under California law, there is no statute which would toll the limitations period in this case. Therefore, plaintiffs must rely upon the doctrine of equitable tolling which has been developed by the California courts. *See Addison v. State*, 578 P.2d 941 (Cal. 1978); *Elkins v. Derby*, 525 P.2d 399 (Cal. 1944). The doctrine's requirements are: "timely notice, and lack of prejudice, to the defendant, and reasonable good faith conduct on the part of the plaintiff." *Addison, supra*, 578 P.2d at 943-944. We do not need to look any further than the doctrine's first requirement. The pursuit of an informal administrative review seeking reinstatement, brought

by someone other than the plaintiff, does not serve as timely notice that the plaintiff will bring a damage action under §1983, particularly where, as here, the plaintiff does not formally enter the §1983 action until six years after his employment was terminated. We are aware of no California decision granting relief from the limitations period in similar circumstances.

Plaintiffs cite no federal cases which would support a finding that the statute was tolled in the present case. The Supreme Court held that the filing of a Title VII employment discrimination charge with the Equal Employment Opportunity Commissio did not toll the limitatinos period for filing a § 1983 action based on the same facts. *Johnson, supra*, 421 U.S. 454. In *Bireline v. Seagondollar*, 567 F.2d 260 (4th Cir. 1977), *petition for cert. filed*, ____U.S.____, 48 U.S.L.W. 3047 (1979), the Fourth Circuit, apparently applying federal law, refused to toll the statute of limitations in an almost identical factual situation. After being notified that she would not be rehired, a university instructor personally pursued her administrative remedies in *Bireline*. She was denied relief and that brought the §1983 action which was found time barred despite the administrative proceedings. 10/

If any claim supports the use of the statute of limitations, the present one does. The plaintiffs initially slept on any rights they had until after the three-year statute of limitations had run. Pursley, the only plaintiff

entitled to relief under this claim, was not brought into the suit until another three years later (six years after his claim accrued). And it is now ten years after the facts giving rise to the claim occurred.

Pursley himself had no administrative remedies. After he received notice of his termination, the only avenue open to him personally was the courts. The administrative procedure involved here was informal. It was brought not by Pursley but by his department chairman We are not dealing with a case where the plaintiff pursued an administrative remedy afforded by statute. As the Supreme Court has observed:

> "Although any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones."

Johnson, supra, 421 U.S. at 463-464. We believe that any "merit" to the plaintiff's claim is sufficiently outweighted by the competing policy interest of protecting defendants from stale claims.

Thus we conclude that Pursley's claim was time barred whether state or federal tolling law is applied.

Plaintiffs argue that even if Pursley's claim is time barred, the second claim was still improperly dismissed. Relying upon *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976), and *East Texas Motor Freight*

System, Inc., v. Rodriguez, 431 U.S. 395 (1977), they reason that the claims of class members are not mooted or destroyed merely because the claim of the named plaintiff is denied. Those cases are clearly distinguishable. Both *Franks, supra*, and *East Texas Motor Freight, supra*, involved the mootness question under the "case or controversy" requirement of Article III. With the mootness issue the Court was concerned with the problem which arises because of the changes occurring to the plaintiff's position in the litigation. The plaintiff had initially stated a good cause of action but, because of the passage of time, may no longer need the remedy sought as there may no longer be a remedy available. With the statute of limitations we are concerned with the problems which arise because of the plaintiff's delay in bringing suit initially, not changes occurring after suit is filed.

Due to the infirmity caused by the running of the statute of limitations, the court below properly entered summary judgment on the plaintiffs' claim based on the blacklist.

Disciplinary Proceedings

This, the third claim, is based upon the disciplinary proceedings brought by the College against those arrested at the January 13 demonstration. In their complaint, the plaintiffs alleged that their due process rights were violated because of the method used to select

members of the faculty hearing panels, the failure to adequately separate the adjudicatory and prosecutorial roles, Hayakawa's bias, and inadequate notice of the charges against them. The court below granted summary judgment, finding that plaintiffs' claims were barred by the prior suit of *Wong v. Hayakawa*, No. C-50983 (N.D. Cal.), where other students had challenged these same disciplinary proceedings.

Plaintiffs have conceded that *Wong* controls the specific due process violations which they had claimed in their complaint. Nevertheless, they contend that they should enjoy the benefits as well as the burdens of the application of res judicata. While *Wong* found that minimum due process requirements had been satisfied by the disciplinary proceedings, that case also held that there was a due process violation in those cases where students had been disciplined based solely upon a police report that did not provide sufficient evidence to sustain a finding of misconduct. We agree with plaintiffs and believe that res judicata principles entitle them to affirmatively rely upon the limited due process holding of *Wong*.

While acknowledging their failure to raise this properly in their pleadings, plaintiffs contended that since they raised it in their motion for summary judgment, they shoud have been allowed to incorporate it by amendment under Fed. R. Civ. P. 15(b).

We agree with the plaintiffs. 11/ While we do not

condone the type of inartful pleading which occurred here, we believe that the principles of res judicata and the interest in prior judgments are of more importance than the pleading rules in the present case. 12/

Funding of the Black Students Union

Appellants' fifth claim is brought by various individual plaintiffs employed by the Black Students Union (BSU), who allege that the BSU received inadequate funds to pay their salaries because of the BSU's involvement in the campus disorders. Appellants do not challenge the following findings where were made by the district court:

1) The demands for money by various student groups exceeded available funds;

2) The BSU, along with other minority groups, did receive funds; and

3) The BSU received much more than most groups, and in fact received a disproportionate ly large share of the available funds.

C.R. 447. Consequently, we must also agree with the conclusion that:

> "... there is no evidence that the BSU, which recieved proportionately more funding than it would be entitled to, was subject to discrimination in budgeting, regardless of what its 'expectations'

> might have been and what promises might have been made."

C.R. 447. Summary judgment was properly entered on appellants' fifth claim for relief.

The district court's summary judgment is AFFIRMED on the mass arrest (first), blacklist (second), and failure to pay the black students' claims (fifth) claims. The summary judgment is REVERSED on the disciplinary proceeding (third) claim.

FOOTNOTES

1/ In addition to the two federal cases discussed in the text, the California Supreme Court overturned the criminal convictions of some of the students who were arrested. *In re Brown*, 510 P.2d 1017 (Cal. 1973), *cert. denied*, 416 U.S. 950 (1974). The court granted the petitioners' writ of habeas corpus finding that there had been erroneous jury instructions under §415, and that there was no substantial evidence to support convictions under §§407 and 408.

2/ The relevant part of the *Carrillo* decision provides as follows:

> "As noted earlier, plaintiffs also move for a declaratory judgment that §§ 408, 409 and 415 have been applied without just cause for the purpose and with the effect of discouraging the exercise of free speech and assembly. There is no evidence in the record plainly establishing abusive invocation of the state criminal laws for such purposes. Although some plaintiffs have

submitted affidavits making such allegations and cliaming a "chilling" of their First Amendment rights, those declarations have been controverted by the defendants. The record is insufficient to warrant the granting of such relief."

Carrillo, supra, at 9-10.

3/ Plaintiffs also argue that the *Carrillo* decision was not decided "on the merits" since the court there had relied upon affidavits in denying the requested declaratory relief. No authority is cited nor are we aware of any which would support this contention. Summary judgment may be decided on the basis of affidavits; nonetheless it still is a judgment on the merits.

4/ Plaintiffs' arguments against the application of resjudicata remind us of the following observation made by the late Judge Lemmon of this court:

> "'Because there must be an end to litigation, the legal principle of res judicata is a salutary one and should be freely applied,' says the successful litigant.
>
> "'Yes, but--', replies his adversary, 'yes, but *our* case is different. As to *us, res judicata* should not be invoked because, 'etc."

Robinson v. Sidebotham, 243 F.2d 16, 17 (9th Cir. 1957), *cert, denied,* 355 U.S. 867.

5/ The Fifth Circuit uses the following test for determining whether the substance of two different motions is the same for res judicata purposes:

> "Is the same right infringed by the same wrong? Would a different judgment obtained in the second action impair rights under the first judgment? Would the same evidence sustain both judgments?"

Astron Industrial Associates, Inc. v. Chrysler Motors Corp., 405 F.2d 958, 961-962 (5th Cir. 1968). Application of this test to the present case would yield the same result as we reach.

6/ Plaintiffs also claim that the defendants are not the same. The present suit is brought against Hayakawa and other officials of the College. *Carrillo* was against Hayakawa, the San Francisco Chief of Police, and District Attorney, and their agents and employees. The deletion of some defendants from the prior suit, where their interests and involvement were sufficiently similar to that of the defendants named in both suits, and where the rights sought to be vindicated remain the same, cannot serve as a bar to the application of res judicata.

7/ Since *Carrillo* was never certified as a class action, plaintiffs argue that it should not be considered in that light. In view of the considerations set forth in the text, we believe that this would elevate form over substance, which we decline to do in this case.

8/ The district court found that virtually all of

those arrested were represented by counsel or had their interests represented by the public defender who was representing 400 of those who had been arrested. Plaintiffs do not challenge this.

9/ Plaintiffs in the present case are in less of a position to complain than some parties who have been bound by the doctrine of virtual representation. The Fifth Circuit explained this as follows:

> "Under the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative."

Aerojet-General Corporation v. Askew, 511 F.2d 710, 719 (5th Cir. 1975), *cert. denied*, 423 U.S. 908 (and see the exhaustive list of cases cited therein where this has been applied).

10/ The court reasoned as follows:

> "While plaintiff was granted an administrative hearing after May 19, 1970, and it may have been appropriate for her to have delayed filing her complaint until after its conclusion, the pendency of the administrative reconsideration did not create a new cause of action; it only made it apparent that if she were to obtain relief it could only come as a result of a successful lawsuit commenced within three years following May 19, 1970."

Bireline, supra, 567 F.2d at 263.

11/ Defendants raise two additional arguments in support of summary judgment in their favor.

First, they claim that the representative plaintiffs were not disciplined by the College and so lacked standing to bring this suit. Plaintiffs controvert this and claim that the named plaintiffs were either placed on probation or reprimanded. We believe that this sufficiently states a "distinct and palpable" injury so as to confer standing. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Since a dispute exists as to whether the plaintiffs were disciplined, summary judgment cannot be based on this ground.

And second, defendants claim the plaintiffs cannot show that the College officials conducted the disciplinary proceedings in bad faith which is necessary to support a §1983 claim. *Wood v. Strickland*, 420 U.S. 308, 322 (1975). We note that neither *Wong* nor the court below addressed this specific issue, and so summary judgment cannot be upheld on this basis.

12/ We believe this result is consistent with the underlying purposes of res judicata which rest "upon considerations of judicial time and public policy favoring the establishment of certainty in legal relations." *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948).

APPENDIX 2

ORDER GRANTING SUMMARY JUDGMENT

The complaint at hand alleges five claims for relief, all of which arise in one form or another from a period of campus unrest at what was then San Francisco State College (SFSC) during 1969 and 1970. The original complaint in this action was not filed until March 21, 1972; the defendants' present motion for summary judgment is directed to the third amended complaint, filed December 17, 1975. Relief is sought under 42 U.S.C. §§1981, 1983 and 1985, and under California law by way of pendent jurisdiction.

THE FIRST CLAIM

The first claim is brought by Greene and Simmons on behalf of a class consisting of 452 persons who attended a campus rally on January 23, 1969, and who were arrested at that rally after an order to disperse had been given. Those arrested were charged with unlawful assembly, failure to disperse, and disturbing the peace. The plaintiffs allege that those arrested were deprived of their rights under the First and Fourteenth Amendments.

It is quite clear, and in fact plaintiffs have themselves argued, that the applicable statute of limitations for these civil rights actions is three years. *Donovan v. Rienhold,* 433 F.2d 738, 742 (9th Cir. 1970). In this case, the alleged deprivation of rights occurred when the arrests were made, on January 23, 1969, and the suit was not filed until March 21, 1972, more than three years after the arrest. Accordingly, the first claim is barred by the applicable statute of limitations.

red by the applicable statute of limitations.

The plaintiffs' assertion that the statute of limitations was tolled pending the outcome of the action *In re Brown,* 9 Cal.3d 612 (1973), is without merit. As indicated below, the legality of the mass arrest was upheld in *Carrillo v. Hayakawa,* (N.D. Cal. 1969, No. C-50808); *Brown* was concerned only with the propriety of certain of the convictions resulting from the arrests, not with the arrests themselves. Therefore, the *Brown* case was not dispositive of the issues in this case, and a federal court hearing an action challenging the arrests would not be required to abstain -- indeed, *Carrillo,* rather than abstaining, did consider and dispose of the arrest issues in this case. Moreover, plaintiffs' cases, e.g. *Fulford v. Klein,* 529 F.2d 377 (5th Cir. 1976), in which §1983 were not allowed while state habeas corpus writs were available, or while appeal from a conviction was pending, all involved situations in which a convicted and imprisoned individual who sought relief pursuant to §1983 had not yet exhausted his habeas and appeal remedies. In the instant case, none of the plaintiffs were involved

in the *Brown* convictions, and there is no indication that any of them were imprisoned, so as to have precluded a §1983 claim for a sufficient period of time to affect the statute of limitation issue. But most importantly, the chief case relied upon by plaintiffs itself precludes their argument. In *Fulford*, the court expressed concern that the statute of limitations might become a problem if the §1983 action were dismissed, and suggested that it should be allowed to remain in court, but be held in abeyance pending the state action (at P. 382). Thus it clearly allowed the filing of a §1983 action to preserve the claim against the statute of limitations, vitiating plaintiff's argument that they were precluded from filing suit.

In addition, it would appear that the asserted claims are precluded, under the principle of res judicata, by the holding of the three judge district court in *Carrillo v. Hayakawa, supra. Carrillo* was a suit brought as a class action on behalf of all persons arrested on January 23, 1969, seeking: i) a declaratory judgment striking down as unconstitutional those statutes upon which the arrests were based, or ii) a declaratory judgment holding that those statutes were enforced unconstitutionally and in bad faith for the purpose and with the effect of discouraging free speech and assembly. The *Carrillo* opinion clearly held that the statutes were not unconstitutional on their face *and* that they were not used to discourage free speech and assembly. Although *Carrillo*

was not certified as a class action, it was clearly treated as such. In any event, the application of res judicata does not depend upon certification where as here, the interests of the parties to the action are so closely aligned with the interests of non-parties as to make the former virtual representatives of the latter. *Aerojet-General Cor. v. Askew,* 511 F.2d 710, 719 (5th Cir. 1975). In this case, virtually all of those arrested were either represented by counsel or had their interests represented by counsel in *Carrillo*(the public defender represented 400 of those arrested). Accordingly, because the *Carrillo* court vindicated the mass arrest (to be distinguished from the subsequent convictions, some of which were overturned in *In re Brown, supra*), the first claim is also barred as res judicata.

Plaintiffs, however, contend that because res judicata and the statute of limitations are affirmative defenses, defendants' failure to plead them amounts to a waiver. F.R.C.P. Rule 8. This contention must be rejected for two reasons. First, as indicated by Wright and Miller, *Federal Practice and Procedure: Civil,* §1277 (1969), a court may permit affirmative defenses to be asserted by motion, especially where the defenses seem likely to dispose of the entire case or a significant portion of the case. Thus, in *Suckow Borax Mines Consol., Inc. v. Borax Consol. Ltd.,* 185 F.2d 196, 204-205 (9th Cir. 1950), it was held that affirmative defenses, although not appearing in the pleadings, may be established upon a

motion to dismiss or a motion for summary judgment, when, by affidavits or otherwise, a set of undisputed facts is revealed upon which the moving party is entitled to judgment as a matter of law.

Second, pursuant to F.R.C.P. Rule 15(a), this Court has discretion to allow defendants to amend their answer to this, the third amended complaint, filed February 4, 1976, to allege these affirmative defenses. Requiring defendants to go through the motions of amending their pleadings would, under the circumstances, be an empty exercise which would not affect the result; accordingly the Court will treat the affirmative defenses as though they had been pleaded. *United States v. United Air Lines,* 216 F.Supp. 709, 711 (Nev. 1962), where the court, recognizing the futility of allowing res judicata to be raised initially by motion for summary judgment when the party could properly raise it by amending the pleadings, permitted res judicata to be raised on a motion for summary judgment. The soundness of this action is supported by the fact that both parties have had full opporutnity to argue the merits of the two affirmative defenses and have do so extensively, eliminating any claim of surprise or prejudice.

THE SECOND CLAIM

The second claim is brought by Daniels, Greene, Simmons and Pursley on behalf of all persons whose

names allegedly appear on certain lists compiled by defendants for the purpose of denying them employment at SFSC on account of the January 23, 1969, arrests. Plaintiffs have conceded that under *Paul v. Davis,* 424 U.S. 693 (1976), the mere compilation of such a list, absent actual loss of employment, does not state a claim under the Act, and that this precludes the claims of Daniels, Greene and Simmons. With respect to Pursley, who taught in the Fall of 1968 but, allegedly because of the "blacklisting", was not rehired in the Spring of 1969, any claim is barred by the three year statute of limitations. Pursley was informed, on March 12, 1969, that he would not be rehired; since the complaint was filed on March 21, 1972, the claim is barred by the statute.

Plaintiffs have attempted to avoid this conclusion by arguing that the statute of limitations was tolled from March 13, 1969, until August 12, 1969. On March 13, a Dr. Rauch instituted a grievance hearing on behalf of Pursley. The grievance committee recommended that Pursely be rehired and paid for the work he had performed during the Spring 1969 semester. On August 12, 1969, Dr. Hayakawa refused to follow the panel's recommendation. Plaintiffs argue that the statute was tolled during the grievance procedure and until Dr. Hayakawa's action on August 12. While it is true that a statute of limitations may be tolled during certain administrative proceedings, that principle has no application in this case. The grievance procedure in effect at

SFSC at the time provided that a grievance could be maintained only by members of the faculty or administration, and Pursley was neither. That Dr. Rauch took it upon himself to file a grievance in an attempt to have Pursely rehired, while perhaps commendable, did not result in an administrative remedy being available to or invoked by Pursely himself, and hence the statute was not tolled.

The California cases cited by plaintiffs are clearly distinguishable from the instant situation. In *Elkins v. Derby,* 12 Cal. 3d 410 (1974), *Myers v. County of Orange,* 6 Cal.App. 3d 626 (1970), and other cases cited, the plaintiff himself pursued administrative remedies which were in fact available to him. As indicated above, in the present case, the grievance procedure here was not available to Pursley, and was pursued by someone other than him. Moreover, the recent Supreme Court decision in *Johnson v. REA,* 421 U.S. 454 (1975), indicates tha the statute of limitations for a §1983 action is not readily tolled by administrative remedies. In *Johnson,* the Court held that the timely filing of an administrative charge with the EEOC pursuant to Title VII did not toll the running of the statute of limitations applicable to an action based on 42 U.S.C.§1981. See also, *Guy v. Robbins and Myers, Inc.,* 45 U.S.L.W. 4068 (1976).

THE THIRD CLAIM

The third claim is brought by Daniels, Greene,

Jenkins and Simmons on behalf of all students arrested on January 23, 1969, and against whom disciplinary proceedings were initiated as a result. The complaint alleges that plaintiffs were deprived of a fair hearing, in violation of their Fifth and Fourteenth Amendment rights, by the process by which members of the faculty hearing panels were selected, by the failure adequately to separate prosecutorial and adjudicatory roles, by Hayakawa's bias, and by inadequate notice of the charges lodged.

Once again, plaintiffs are barred by a prior suit. In *Wong v. Hayakawa* (N.D. Cal. No. 50983), a number of students challenged these same disciplinary proceedings. Judge Zirpoli cited *Scoggin v. Lincoln University,* 291 F.Supp. 161, 171 (W.D. Mo. 1968), for the proposition that the minimal due process requirements in student discipline cases were 1) that adequate notice be given of the charges and evidence; 2) that an opportunity for a fair hearing be given the student; and 3) that no disciplinary action be taken on grounds not supported by substantial evidence. Judge Zirpoli expressly found that the first two requirements had been satisfied in the disciplinary proceedings in question, but that the their requirement was not met *as to the particular plaintiffs* in the *Wong* case, because the only evidence relied on in imposing discipline on them was in inadequate police report. Since the present case does not allege that there was a similar inadequacy of evidence but rather

challenges only the same notice and hearing procedures which were upheld in *Wong*, the claim is barred by the prior suit.

THE FOURTH CLAIM

The fourth claim is brought by Jackson, Bell, Reams and Jordan on behalf of all candidates for election to student office in 1970 as members of certain slates. These candidates were declared ineligible to run for office by student Mark Wolfe, the election committee chairman. Plaintiffs disputed this decision but the Student Legislature upheld it. Plaintiffs then asked Hayakawa to delay the election and resolve the issue of eligibility, which, after an administrative hearing, he refused to do. Plaintiffs now allege that Hayakawa was biased in his ruling.

Once again, an earlier action is dispositive. In *Bull-Moose Party v. Hayakawa*, (N.D. Cal. No. C-70835 RFP) certain plaintiffs sought a preliminary injunction to prevent the same student body elections at SFSC in April of 1970. Judge Peckham concluded that the issues were moot or about to become moot, and dismissed the action, such dismissal being without prejudice to the filing of a new action in the event that "further instances occur of confusion in connection with registration of students. . . ." Insofar as the instant complaint alleges no "further instances", the dismissal in the *Bull-Moose* case

precludes further litigation concerning the propriety of Hayakawa's refusal to delay the election. Whatever claims arising from the sequence of events surrounding the election and Hayakawa's actions, whether for damages or for injunctive relief, should have been raised in the *Bull-Moose* case, and the dismissal in that case is conclusive as to all such matters. *Cambist Films Inc. v. Duggan*, 475 F.2d 887, 890-891 (3rd Cir. 1973); *Clark v. Redeker*, 406 F.2d 883 (9th Cir. 1969). Plaintiffs have had their day in court: two of the named plaintiffs for this claim as well. As discussed above with respect to the first claim, the identity between their interests and the interests of the other named plaintiffs be barred by principles of res judicata. *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975).

Even disregarding the *Bull-Moose* case, plaintiffs would be unable to state a claim for relief. The apparent reason why the student government did not allow plaintiffs to run for office was their lack of qualification to do so – specifically, they were not full time students or did not have a sufficiently high grade point average. Inasmuch as these objective prerequisites to candidacy were not satisified, it was proper for the student government to refuse plaintiffs access to the ballot, and it is difficult to conceive how Hayakawa, by merely refusing to overrule the student government, acted in violation of their constitutional rights. There existed clear, indepen-

dent, constitutionally lawful reasons for not overruling the student government and barring plaintiffs from running for office. Cf. *Mount Healthy City School District v. Doyle, 45 U.S.L.W. 4079 (1977).*

THE FIFTH CLAIM

The fifth claim is brought by various individual plaintiffs, and alleges that the Black Students Union (BSU), because it was active in the campus activities of 1969-1970, was budgeted inadequate funds to pay the salaries of all those it had hired. Defendants have shown that: i) the demands for money by various groups exceended the available funds; ii) that various minority groups, including the BSU, received funds; and iii) that the BSU received much more than most groups, and infact received a disproportionately large share of available funds. Accordingly, these is no evidence that the BSU, which received proportionately more funding than it would be entitled to, was subject to discrimination in budgeting, regardless of what its "expectations" might have been and what promises might have been made.

For these reasons herein stated, defendants' motion for summary judgment on plaintiffs' third amended complaint is granted.

IT IS SO ORDERED.

DATED: April 20, 1977

WILLIAM W. SCHWARZER
United States District Judge

APPENDIX 3

CERTIFIED CLASS CONSISTING OF THOSE PERSONS DENIED EMPLOYMENT BASED ON THE BLACKLISTS

Petitioners alleged in their Second Claim that, on February 17, 1969, and on February 18, 1969, following the mass arrest in the campus, defendants compiled blacklists of persons arrested for the purpose of denying them employment at San Franciso State College. In particular, the Third Amended Complaint alleges that plaintiff Peter Pursely, whose name appears on the "blacklist" was approved for teaching during the Spring Semester, 1969, in fact taught in the psycology department, but because of the "blacklist" respondents refused to pay him for the work performed as were other persons similarly situated. As to this claim, Judge Peckham certified a class consisting of the following individuals:

> "Those persons whose name appear on the list, originally attached to a memorandum signed by S.I. Hayakawa dated February 17, 1969, or on amemded official lists subsequently issued containing additional names, and who were denied employment because their names appeared on said list and who would have otherwise obtained employment in a college program."

Interdepartmental Correspondence

SAN FRANCISCO STATE COLLEGE

TO: Reginald Majors, Director, Education Opportunity Program

DATE: Feb. 17, 1969

FROM: S.I. Hayakawa Acting President

SUBJECT: Hiring Eligibility Spring Educational Opportunities Program

After thorough consideration, my administrative staff and I feel that it would be inappropriate for the college to employ for the spring semester any individuals arrested for distrubances in the fall. For this reason I am forwarding a list of those arrested. The persons named are not eligible for hiring by any college program for the spring semester.

SIH:lb
Attach:
cc: Vice President Garrity
Dean Daniel Feder

Interdepartmental Correspondence

SAN FRANCISCO STATE COLLEGE

TO: Donald Garrity, Vice President - Academic Affairs

Date: February 18, 1969

FROM: S.I. Hayakawa, Acting President

SUBJECT: Hiring Eligibility. Spring Semester

After thorough consideration, my administrative staff and I feel that it would be inapproriated for the college to employ for the Spring Semester any individuals arrested for distubances in the Fall. For this reason I am forwarding a list of those arrested. The persons named are not eligible for hiring by any college programs including appointment as teaching and graduate assistants for the Spring Semester.

ORIGINAL BLACKLIST MEMOS:

On the previous page we wrote out what the memos accompanying the blacklists read because we wanted the memos to be legible. But here are the original memos under the signature of S.I. Hayakawa.

...ental Correspondence

SAN FRANCISCO STATE COLLEGE

...A. Ronald Majors, Director, Educational Opportunity Program — DATE Feb. 17, 1969

...S. Hayakawa, Acting President

...: Hiring eligibility Spring Educational Opportunities Program

After thorough consideration, my administrative staff and I feel that it would be inappropriate for the college to employ for the spring semester any individuals arrested for disturbances in the fall. For this reason I am forwarding a list of those arrested. The persons named are not eligible for hiring by any college program for the spring semester.

S.I. Hayakawa

SIH:lb
Attach:
cc: Vice President Garrity
Dean Daniel Feder

...ental Correspondence

SAN FRANCISCO STATE COLLEGE

Donald Garrity, Vice President-Academic Affairs — DATE February 18, 1969

: S. I. Hayakawa, Acting President

ECT: Hiring Eligibility, Spring Semester

S.I. Hayakawa

RECEIVED
FEB 18 1969

After thorough consideration, my administrative staff and I feel that it would be inappropriate for the college to employ for the Spring Semester any individuals arrested for disturbances in the Fall. For this reason I am forwarding a list of those arrested. The persons named are not eligible for hiring by any college programs including appointment as teaching and graduate assistants for the Spring Semester .

CONSOLIDATED LIST OF PERSONS ARRESTED

Adamski, Carol J.
Alcantara, Ray
Alvarado, Frank S.
Alvarado, Julio E.
Alvarado, Roger T.
Alt, Terry B.
Anidon, Peggy
Anton, Anatole
Apana, Karen
Applman, Daniel
Arbogast, Brian
Arbogast, Christine
Art, John
Arthur, Lynn
Ayala, Renaldo
Agla, Oladitto
Aitken, Bruce J.
Alexis, Jack H.
Allen, Avery T.

Bain, Michelle
Baker, Barbara A.
Barickman, Namby M.
Barman, Michele J.
Barnett, Ruth P.
Barnette, Boyd
Barr, Matthew
Barrett, Teresa
Beach, Jeffrey
Bell, Thomas
Bentzman, Bette
Beaudoin, Mark W.
Bergman, Miranda
Berkelman, Pearl
Bethell, Susan M.
Beytin, Susan A.
Biberman, George A.
Bishop, Betty
Blaine, Michael P.
Bliss, James
Bodine, Carol K.
Boland, Mary E.
Boles, Juanita K.
Boles, Leslie
Bonifas, Barbara
Boone, Barrie D.
Borovoy, Barbara
Bovey, Frank A.
Bowen, Gordon L.
Bozorg, Abbass
Bradford, Pat M.
Braeger, Gene R.
Branconi, Jean
Brill, Ernest
Broadhead, Robert H.
Brongel, Richard H.
Brown, Elizabeth
Brown, Robert F.
Brown, Sheila M.
Brozicevic, Connie J.
Bruce, Herbert G.
Brush, James A.
Burtless, Alice V.
Bush, Michael R.
Butz, Carl J.
Barr, Gary Francis
Barron, Gregory Mark
Baskerville, John W.
Beresford, Donald J.
Berry, Frederick George
Aka: Brown
Black, Sylvester A.
Block, Larry
Bousquet, Joseph E.
Brandon, Daniel K.
Brod, John G.
Brooks, David R.
Brunner, George Andrew
Buell, Thomas Phillip
Butler, Patricia L.

Campbell, Janet M.
Campbell, Philip W.
Campusano, Jesus A.
Canright, Michael J.
Canright, Stephen J.

Carey, Michael
Carpenter, Willard
Carrillo, Carmen
Casqueiro, Larry C.
Cavaliero, Victor
Cavanaugh, Benjamine M.
Chambers, John L.
Chew, Laureen
Chew, Herb
Chin, Eddie Y.
Chlosta, Deborah
Chop, Jeffrey
Churchill, Ellen
Ciucci, Elizabeth
Cirimeli, Jean
Coats, Timothy J.
Cleveland, John D.
Codiga, Lynn
Colbert, George P.
Colcord, Kathy
Cole, Roy P.
Colosimo, Louis A.
Colwell, Brent A.
Connolly, Stephen B.
Contreras, Jesse
Cook, Helen
Cooper, Michael
Cordova, Salvador R.
Crank, Charles S.
Creer, Delores
Cresci, Melanie
Crouch, George R.
Cooke, Christopher C.
Crutchfield, Nesbit D.
Curtis, Richard
Campbell, Bruce L.
Canada, Kenneth
Carson, Frederick
Cassell, Roger C.
Cato, Welton J.
Clark, Steven K.
Coaks, Theris
Cuddy, Ronald W.

Dillon, Hari
Dahl, Linda
Daniels, Lonnie J.
Deanbrogio, David
De Giere, Gregory
Delanoy, Robert
De la Cruz, Edward
De Lago, Patricia
De la Rosa, Jean
Demarco, Gordon
Denton, David
Desegur, Gerrard
Dobriski, Michael G.
Douglas, James R.
Dreith, Dave
Dubose, Jonathan M.
Dewitt, Elizabeth
Dillon, Elena
DiMero, Jane L.
Dobkowitz, Roger
Donneerberg, Elizabeth
Drake, Pamela
Drath, Marilyn
Druehl, Greg
Dug[illegible]h, James
Davis, John
Devore, John

Ewart, George
Easton, Sharon
Embry, Martha
Ennis, Kathleen
Eng, Jane
English, Robert S.
Epps, Kathrin A.
Erickson, Judy
Erickson, Paul R.
Edwards, Thomas B.

Frank, Carl
Feely, Diane
Feffis, Karen Aka
Ferris, Karen
Ferentinos, George
Forman, Harold A.
Forman, Alexander

Forsyth, Neil
Freeman, Edward
French, Kelly
Friedlander, David
Frisch, Patricia
Fujimoto, Chris
Furuyama, Matsuo
Faltus, Susan
Feinglass, Robert A.
Fiddes, James W.
Fisher, John C.
Flanagan, Michael D.
Fiorini, Elizabeth
Foreman, Harold A.

Gail, Isidu
Glenn, Gail
Gorner, George
Gelin, Richard
Gibson, Richard
Goldstein. David
Goodlett, Carleton
Gordon, David
Gray, Katherine
Gwyn, Thomas W.
Gabel, Thomas
Garbell, Harlan
Garth, Beatrice
Gary, Paul aka
Paul Voss
Garren, Lynn
Gates, Richard
Gernand, Bruce
Gesas, Gloria
Gilbert, Suzanne
Gillig, Nina
Ginestra, James
Gitlin, Todd
Glaspie, Mary L.
Glover, Danny L.
Gold, Steven K.
Golde, Patricia
Goodfield, Barry
Goodman, Brenda J.
Goodman, Theodore J.

Goodwin, Leroy Jr.
Goodwin, Thomas H.
Gorringe, Richard A.
Grace, Robert L.
Gracia, Ronald L.
Gravitt, Mary R.
Green, Larry
Greene, Anthony
Greer, Elizabeth
Green, Dove
Griffin, Donald Q.
Griffith, Richard D.
Gromin, Richard J.
Grosten, Gordon
Guiterrez, Lisa R.
Gustafson, James P.
Grissom, Pamela

Hano, Susan C.
Hansen, John M.
Hanson, Charles A.
Hanson, Peter P.
Harbeck, Ronald
Hare, Nathan
Harrington, Peter R.
Harris, Steven L.
Hauser, Sandra K.
Hayes, Thomas M.
Helmer, William
Helppie, Douglas W.
Hertzman, sandra J.
Hetherington, Penny A.
Hewitt, Sharon K.
Heynick, Carla M.
Hilberman, Kathe R.
Hill, Patricia A.
Hinman, Pricilla
Howard, Gwendolyn A.
Huber, Michael D.
Huddleston, Betty J.
Hughes, Dale L.
Huntington, Dennis O.
Hyink, Lawrence
Hamilton, Charles R.
Hammerling, Phillip S.

Hands, Peter A.
Harrison, Roy A. Jr.
Hartman, Joseph Gelders
Heers, Arthur F.
Heft, Robert C.
Hill, Gary L.
Howe, Steven D.
Hyland, Richard F.
Hamilton, Raymond W.
Hartford, Bruce A.
Henricks, John W.
Hughes, Dale
Hunter, Delores
Hartog, Phillip A.
Ikeda, Carolyn T.
Ilumin, Edward G.
Ilumin, Robert G.

Jewett, David G.
Johnson, Cynthia
Johnson, Gail F.
Johnson, Renee
Jones, Elwood F.
Jones, Jeffrey C.
Jones, Ronald R.
Jones, Ronnie H.
Joslin, Teri A.
Juchert, Walter R.
Jones, Sharon
Jones, William
Jarrell, Donald
Jenkins, Johnnie
Johnston, Frank E.
Jordan, Don D.

Kaffke, Roberto
Kalantari, Khosro
Kane, Jennifer
Kangas, Andrew
Kangas, Emil
Katzman, Seth
Kearney, Frederick
Kearney, Karen A.
Kearns, Brantley F.
Kee, Frank D.

Kelley, Bonnie P.
Kelly, Georgia P.
Kelly, Kathryn E.
Killebrew, Emily L.
Kissack, Anne C.
Kitt, Douglas
Koenig, Nancy L.
Koloms, Charles A.
Kopke, Alan N.
Kopke, Syrilda S.
Kornfeld, Alan D.
Kramer, Helen
Krueger, John D.
Kuraoka, David
Kurz, Connie
Kelly, William J.
Kolodzik, Dennis
Kornfeld, Phillip J.

Lamont, Dortia
LaMotte, Sharon K.
Landis, Dale A.
Lanright, David M.
Larney, Garry L.
Larez, Manuel D.
Larsen, Gerlad E.
Larsen, Larry L.
Laughland, Donald A.
Ledbetter, Sandra
Lee, Berwyn
Lee, Nathan
Lee, Weyman
Leong, George
Levin, Carol A.
Levine, Geni
Levy, Robert
Lewis, Melinda
Llamas, Roger
Llorente, Edward
Lockshin, Larry
Lopez, Jose
Love, Jonathan
Lum, Kendric
Larsen, Bill A.
Leeds, Joshua

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Levin, John G.
Lewis, Nancy
Lindsley, Byron F. Jr.
Lum, Halford J.

Macklin, Richard
Mackenzie, Anne
Magezis, Joy
Mannix, Molly
Mannick, John
Manwell, Robert
Marca, Ortiz
March, Rachel
Marchi, Eugene
Margolis, Gregory
Massion, Mark E.
Maxey, Thomas
McCarthy, Martha A.
McFarran, Jonn C.
McGee, Martha J.
McMath, Moina G.
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Meyers, Helen
Millbury, Peter
Mills, Thomas
Molloy, Susan R.
Montes, Regino S.
Morris, Peter
Morrissey, William G.
Moore, Diane
Moore, Rex
Morrow, Cheryl
Morton, Patricia
Mudavahna, Leonard
Muniz, Jaime
Martin, Douglas
Martinez, Gene
Miller, David
Miranda, Anthony
Matthews, Glenn T.
Matusek, Brett V.
Milne, Emile A.
Mowdy, Robert W.
Murray, George M.

McAllister, Donald
Maass, Steven O.
Malone, Alex McRae Jr.
Mayer, William

Napoliton, Sally
Nelson, Eric
Noel, Kenneth
Nesmith, Claire A.
Noordhoff, Paulette

O'Callaghan, Michael
O'Nela, Daniel A.
O'Neal, Dennis
O'Quin, Michael
Orr, Harry
Ortiz, Rachel
Ott, John
Okpokam, Paul N.
Oliver, James J.
Ortega, Robert R.

Pallidono, Moiece L.
Palm, Anita
Patacsil, Alice
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Pedraza, Mary
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Perry, David
Pfeifer, Karen
Pifarre, Juan
Pine, Charles
Pine, Ruth
Poge, Ruth
Pratt, James
Pulliam, William
Pursely, Peter
Passalalpi, Carlo L.
Pehrson, Gregory
Pederson, Gerald
Powell, Grant
Price, George
Prudhomme, Robert

Queen, James
Quijano, Gena M.
Quinn, Charles D.
Quinn, Jacquelin
Quidachay, Ronald

Radford, Tommie
Randall, Bridges
Rappaport, Betty
Rasmussen, Charles
Rex, Sue A.
Riley, Harold
Roberts, Stanley
Robertson, Phillip
Rogers, William H.
Romero, Rosemary aka
Zepeda, Rosemary
Romero, James
Rosemark, William
Ross, Karen
Rotoner, Rita
Rutzick, Phillip
Rothbaum, Charels
Ruiz, Ralph
Rappaport, Bruce M.
Reggiardo, Carl J.
Reim, Terry A.
Ricci, Humberto
Rice, Alfred
Rivera, Juan A.
Robinson, Willie Ed.

Safiont, Jose
Sagun, Rueben F.
Sakala, Patricia M.
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Saunders, Virginia
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Segen, William F.
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Shinn, Eric
Shively, Mary
Short, Alan
Simmons, Sollie J.
Slouber, John
Smith, Maryann
Sogol, Leslie
Solganick, Jan
Schumacher, Thomas
Smith, Bruce
Smith, Heidi
Smith, Janice
Smith, Marilyn
Smith, Vern
Smyth, Andrew
Spasaro, Frank P.
Sperber, David P.
Siplman, Richard S.
Stack, Mark
Stein, Allison
Stensrud, Peter
Stephens, Michael
Sternberg, Lawrence
Stevens, Fred
Stwart, Benjamin
Stice, Kenneth
Stigall, Lorna
Stocker, Thomas
Stoloff, Pamela
Stratton, Cathie
Stringer, Bernard
Sturdevant, Norman
Sundermeyer, Michael
Sherlock, Joe
Sloan, Nancy
Smothers, Donald
Stonum, Jerry
Stuart, Philip
Salter, James W.
Sampson, Daniel Jr.
Savage, Arthur D.
Scheimer, Gordon
Silverman, Janet
Smith, Harry
Smith, Kenneth J.

Stephen, Norman J.
Stroud, Welvin L.

Tabachnick, Carol
Takahashi, Elizabeth
Taylor, Anne
Taylor, Carol
Taylor, Gerald
Taylor, John R.
Teeter, Donald
Terauchi, Terrance
Thalheimer, Fred
Thalheimer, Patricia
Thom, Glen
Thomas, Carolyn
Torshizi, Alierza
Torre, Helen
Townsend, Arnold
Tracy, Rose
Tucker, Catherine
Turner, Walter
Tyson, William
Theriot, Marilyn
Taylor, Robert D.
Tokarsky, Robet I.
Thrombley, John R.
Treskunif, Sharon

Uran, Marilyn

Vardara, Phillip
Vargas, Robert
Vialpando, Sadie
Viniegra, Louis
Vorsatz, Louise
Varnardo, Jerry C.
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Vose, Gregory

Walton, Jimmy
Waters, Simon
Watters, Laurie
Webb, John
Weir, Wendy
Weisend, Mary
Wells, Janet
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West, Donna
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Williams, Thomas
Wilmot, Patrick
Wilson, Claude
Wilson, James
Wilson, Patricia
Wilson, William
Winans, Lorrie
Winter, George
Winters, Lynne
Wong, Alfred
Wing, Gery
Wong, Harold Stanley
Wong, Mason
Wooman, Patricia
Woseeri, Kathy
Washington, Cecil
Wong, Stanley
Washington, Robert L.
Weichel, Kenneth
Wheeler, David
Whitehorn, Robert
Williams, Meril
Wittmaack, Ronald aka
Whittmaack, Ronald
Wickum, Jeff
Williams, Arthur
Ward, Jennifer L.

Yamazaki, Paul
Yeghoian, Paula
Young, John
Yoza, Clifton
Yamahon, Daniel M.

Zebrowski, Wllwn
Zeitman, Sandra
Zeppa, Alan

Zolli, Robert
Zorthian, Barry
Zeltzer, Steve

Peter Pursley was the representative of the class as defined by Judge Peckham. The above lists of names accompanied the February 17, blacklists and amended lists in accordance with the class boundries. Petitioners discovery did find many other members of the academic community has been denied employment because of the enforcement of the blacklists but discovery terminated upon the granting of summary judgment. Acknowledge of the authenticity of these blacklists can be found in the answer to respondent Hayakawa's interrogatories; respondent Hayakawa's deposition of November 15, 1974. In addition, the deposition of Samuel I. Hayakawa in *Barry Jablon v. S.I. Hayakawa* et al No. C-71 2021 SAW Aug. 22, 1972.

APPENDIX 4

DECLARATON OF BLACKLISTS CLASS REPRESENTATIVE PETER W. PURSLEY

I, Peter W. Pursley, declare as follows:

1. From September, 1968 through June, 1970, I taught in the Psychology Department at San Francisco State College on a part-time basis. My appointments to teach were made at the beginning of each semester.

2. The hiring procedure customarily involved oral notice of appointment from the appropriate department administrator and subsequent routine processing of appointment papers.

3. After the commencement of the Spring, 1969 semester on February 17, 1969, I began teaching an undergraduate course in psychology upon instruction to

do so from psychology faculty member Mr. George Craddock. Mr Craddock was the coordinator of the program in which I taught and he advised me that his reccomendation that I be rehired to teach in Spring, 1969 had been approved by the Psycology Department Chairman, Dr. Stephen Rauch.

4. Because of administrative delays, the Spring, 1969 appointment papers for myself and other instructors were not initiated until February 20, 1969. Subsequently, my appointment papers were approved by the Dean of the School of Behavioral and Social Sciences.

5. On March 12, 1969, Dr. Rauch was informed by Frank Dollard of the College Administration that the administration would not approve my rehiring because my name had appeared on a list of persons arrested at the College.

6. Dr, Rauch promptly notified me of this development but instructed me to continue meeting my class. Because the administration's refusal to approve my rehiring was for reasons unrelated to my qualifications to teach, Dr. Rauch was confident that approval for my rehiring could be obtained through the College's grievance procedure.

7. On March 13, 1969, Dr. Rauch filed a grievance with the College's Grievance and Disciplinary Action Panel. The Panel sustained Dr. Rauch's contention that the administration's refusal to approve my rehiring was improper and specifically recommended that I be reim-

bursed for teaching services rendered.

8. I taught for the entire Spring, 1969 semester with the approval of the Psychology Department Chairman and the program coordinator. I received no pay from the school.

9. On August 12, 1969, College President S.I. Hayakawa gave written notice to the Chairman of the Grievance and Disciplinary Panel that he would not implement the Panel's recommendations.

10. In September, 1969, Dr. Rauch submitted for Fall semester, 1969, my appointment papers. After initial indications that the administration would again oppose my appointment because of the arrest list, the administration reversed its position and approved my rehiring for the Fall semester, 1969.

11. In a memorandum dated June 5, 1969, Dr. Dollard acknowledged the fact of my "continuing employment" at the College in and instructional capacity. A copy of that memorandum is attached hereto as Exhibit "A".

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 9th day of March, 1977, at San Francisco, California.

PETER W. PURSLEY

INTERDEPARTMENTAL CORRESPONDENCE

SAN FRANCISCO STATE COLLEGE

TO: President Hayakawa
FROM: Dr. Frank Dollard
SUBJECT: Presidential directive of February 18, 1969

DATE: May 7, 1969

Pursuant to my report yesterday, I wish to question the continuing "employment" of Mr. Pursley, Mr. Varnado, and Mr. Crutchfield as part-time instructors in E.O.P. It seems to me improper that these students should be employed, even without pay, since their employment in an instructional capacity, under the conditions, flouts the President's directive of February 18th. It might also establish an intolerable precedent for ignoring other Presidential orders. I think it necessary to take appropriate action in regard to those responsible for this situation.

The grievance that Dr. Rauch has brought against me will go to a full hearing. The grievance is actually directed primarily against the President's directive with respect to Mr. Pursley. If the hearing Committee decides in favor of Dr. Rauch, we will face some disagreeable repercussions. I think it essential that we confer before the hearing begins so as to make certain that we are clear in our understanding of the reasons for the directive.

fdd:vk
cc -Vice President Garrity
Vice President Smith
Dean Reddell
Dr. Duerr
Mr. Jones

PROOF OF SERVICE

I, JOHN H. TUCKER JR., member, U.S. Supreme Court do hereby declare that pursuant to the order for service of process other than by U.S. Marshall respondents through their counsel were served copies of this writ as follows:

3 copies

Attorney General of the State of California
Deputy Attorney General MATTHEW P. BOYLE
6000 State Building
San Francisco, CA 94102

San Francisco State University
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San Francisco, CA 94132

S.I. Hayakawa
225 Eldridge Avenue
Mill Valley, CA 94941

In addition, any and all notices, applications, motions, etc. by the U.S. Supreme Court Clerks or respondents should be mailed to the following address:

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Supreme Court, U. S.
FILED
MAR 15 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1232

CHARLES JACKSON, et al.,
Plaintiff-Appellants,

vs.

S. I. HAYAKAWA, former president of
San Francisco State College, et al.,
Defendant-Appellees.

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUBJECT INDEX

	Page
Statement of the case	1
Introduction	1
Issues presented	3
Statement of the facts	3
First cause of action	3
(Mass arrest)	3
Second cause of action	4
(Purported blacklist)	4
I	
A court may take judicial notice of its own files or those of the district court	6
II	
As to the mass arrest (first cause of action) the court took judicial notice of Carmen Carrillo et al, v. S. I. Hayakawa, et al. Northern District of California No. C-50808	6
III	
The principles of res judicata/collateral estoppel bar the first cause of action	7
IV	
The entire proposed class was bound by the previous litigation	10
V	
Judgment of the pleadings and summary judgment is proper because there are no legitimate plaintiffs who have stated a claim on the second cause of action	15
VI	
Peter Pursley has not stated a claim in the second cause of action because of the Statute of Limitations and the underlying facts	17
VII	
Summary judgment was proper as to the fifth cause of action—student budget	21
Conclusion	25

TABLE OF AUTHORITIES CITED

Cases	Page
Aero Jet v. Askew, 511 F.2d 710	12
American Pipe v. Utah, 414 U.S. 538	12
American Surety Co. v. Baldwin, 287 U.S. 156	10
Andreadis v. Bd. of Trustees (1976) 59 Cal.App.3d 344	19
In Re Antibiotic Anti-trust Cases, 333 F.Supp. 296 (Southern District New York) affirmed 450 F.2d 1119 (2nd Cir. 1971)	14
Associated Students v. Trustees (1976) 56 Cal.App.3d 667	24
Baker v. Carr (1962) 369 U.S. 186	17
Baldwin v. Iowa State, 283 U.S. 522	10
Bishop v. Wood (June 1976) 426 U.S. 341	15
Blonder-Tongue v. University Foundation, 402 U.S. 313	12, 13, 14
Bd. Education v. Roberts, 48 L.Week 4035, 4041 (Nov. 28, 1979)	25
Bd. of Regents v. Roth, 408 U.S. 564	15
Bogacki v. Bd. of Supervisors, 5 Cal.3d 771	15
Boys Town v. Welchurch (9th Cir. 1965) 349 F.2d 576	9
Butz v. Economou 438 U.S. 478	24
Cambist Films, Inc. v. Duggan (3rd Cir. 1973) 475 F.2d 887	7, 8
Carrillo v. Hayakawa (No. District California 1969) No. 50808	2, 3, 4, 6, 7, 9, 10, 13, 14, 15, 17, 20, 21
Castro v. Beecher (1st Cir. 1972) 459 F.2d 725	13
Clarke v. Redeker (9th Cir. 1969) 406 F.2d 883	8
Collins v. United Air Lines, 514 F.2d 594	19, 20
Cream Top Creamery v. Dean Milk (6th Cir. 1967) 383 F.2d 358	9
Dombrowski v. Pfister (1965) 380 U.S. 479	2, 3, 9
Greenwood v. Peacock, 384 U.S. 808	17
Griffin v. Breckenridge, 403 U.S. 88	17
Hanna v. Plummer, 380 U.S. 460	18
Hansberry v. Lee, 311 U.S. 32	14
Harris v. Younger (1971) 401 U.S. 37	2, 3, 16

Cases	Page
Hatchitt v. U.S. (9th Cir. 1946) 158 F.2d 754	9
Imbler v. Pachtman, 424 U.S. 409	10
International Prisoners v. Rizzo (P.A. 1973) 356 F.Supp. 806	13
Jimenez v. Weinberger (1975) 523 F.2d 689	15
Laird v. Tatum (1972) 408 U.S. 1	16, 17
Lambert v. Conrad (9th Cir. 1952) 308 F.2d 571	6
Lau v. Nichols (9th Cir. 1973) 483 F.2d 791, reversed on other grounds 414 U.S. 563	13
Liberty Mutual v. Wetzel (3rd Cir. 1976) 508 F.2d 239, Cert. Denied 421 U.S. 1011	12, 16
Mabey v. Reagan (9th Cir. 1976) 537 F.2d 1036	19
MaChuck Moon v. Dulles (9th Cir. 1956) 237 F.2d 241	14
McCarthy v. Noren (9th Cir. 1967) 370 F.2d 845	9
McCormick v. Sullivan, 10 Wheat 192	10
Montana v. U.S. (1979) 440 U.S. 147	10, 12
Mount Healthy v. Doyle (1977) 429 U.S. 274	20
O'Shea v. Littleton (1974) 414 U.S. 488	16
Parklane Hosiery v. Shore 439 U.S. 322	10
Paul v. Davis (1976) 424 U.S. 693	16
Pierson v. Ray, 386 U.S. 547	10
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Renn v. Smith (5th Cir. 1969) 410 F.2d 390	13
Rizzo v. Goode (1976) 423 U.S. 362	17
Ross v. Bernhard (1970) 396 U.S. 531	7
Sam Fox v. United States, 366 U.S. 683	14
Scheuer v. Rhodes, 416 U.S. 232	10
Senter v. General Motors (6th Cir. 1976) 532 F.2d 511	13
Sierra Club v. Morton (1972) 405 U.S. 727	17
Small Business Administration v. Taubman, 459 F.2d 991	8, 9

TABLE OF AUTHORITIES CITED

CASES	Page
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Stiltner v. Rhay (9th Cir. 1963) 322 F.2d 314	6
St. Paul Fire & Marine Insurance Co. v. Cunningham (9th Cir. 1958) 257 F.2d 731	6
Wetzel v. Liberty Mutual (3rd Cir. 1975) 508 F.2d 239	13
White v. Beal, 413 F.Supp. 1141	13
Wong v. Hayakawa (No. District California No. 50983)	2
Wood v. Strickland, 420 U.S. 308	10
Younger v. Harris, 401 U.S. 37	9
Zwickler v. Koota, 389 U.S. 241	9
Statutes	
California Education Code:	
Section 24053.7	23
Section 24301	19
Section 24315	19
California Evidence Code, section 201	6
28 U.S.C. Rule 23	12
Rules	
Federal Rules of Civil Procedure:	
Rule 2	7
Rule 23	11
Rule 23(A)	11
Rule 23(B)(1)	11, 15
Rule 23(B)(2)	11, 12, 13, 15
Rule 23(B)(3)	11, 14
Constitution	
United States Constitution, First Amendment	7, 9, 16, 20, 23
Texts	
2 Moores Federal Practice (2nd Ed.) No. 206, pp. 378 and 381	7
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18 U.S. Supreme Court Digest Lawyer's Edition pp. 50 and 52	12
Wright Federal Courts (2nd Ed. 1970) No. 67	7

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-1232

CHARLES JACKSON, et al.,
Plaintiff-Appellants,

VS.

S. I. HAYAKAWA, former president of San Francisco State College, et al.,
Defendant-Appellees.

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is a Civil Rights case. The petition is from a judgment pursuant to Summary Judgment on all Five Causes of Action, the Ninth Circuit affirmed except as to one cause.

INTRODUCTION

The Ninth Circuit and Judge Schwarzer issued detailed orders granting summary judgment (See Appendix 1 and 2 of Petition). These decisions fully and concisely answer all questions raised by appellants herein. Our response therefore is mostly an application of the law as stated therein.

We asked the lower courts to take judicial notice of the files of *Carrillo v. Hayakawa* (No. District California No. 50808) and *Wong v. Hayakawa* (No. District California No. 50983).

This is a civil rights action arising out of the turmoil at San Francisco State University during 1969 and 1970. The defendants are or were various officials of the State College system. Plaintiffs attempted to have this matter determined as a class action.

In the First Cause of Action plaintiffs alleged that a mass arrest violated their constitutional rights; In the Second Cause of Action that a blacklist was prepared by the college because of their involvement in the strike and their arrests; In the Third Cause of Action that procedures for discipline set up by the college were improper; In the Fourth Cause of Action that events concerning the student elections of 1970 violated their rights; In the Fifth Cause of Action that certain allegedly discriminatory funding practices violated their rights. Appellants did not appeal from dismissal of their fourth cause of action.

After *Dombrowski v. Pfister,* 380 U.S. 479, 490 in 1965 and before *Harris v. Younger,* 401 U.S. 37 in 1971 the lower federal courts felt it proper to consider claims of bad faith enforcement of criminal statutes to prevent exercise of civil rights and they would actually enjoin state criminal proceedings. The *Carrillo* decision was during this period and turned *not* on a need to show irreparable injury, but on plaintiff's failure to prove bad faith.

ISSUES PRESENTED

1. Was the First Cause of Action (mass arrest) barred by the previous action of *Carrillo v. Hayakawa*—a three-judge federal court decision?

2. Was the Second Cause of Action barred by the Statute of Limitations?

3. Whether given the uncontradicted evidence that despite conflicting demands, plaintiff Black Student's Union was given a disproportionately great share of available funds, a cause of action can lie alleging more would be given absent racial motive.

STATEMENT OF THE FACTS

In the interests of coherence, we will present the facts as to each cause of action.

FIRST CAUSE OF ACTION
(MASS ARREST)

A mass arrest was made at San Francisco State College on January 23, 1969 by members of the San Francisco Police Department (C.T. 388). In an effort to stop the subsequent criminal trials some of those arrested filed a class action suit—*Carrillo v. Hayakawa,* No. District of California 1969, No. 50808. Because the events occurred between *Dombrowski* and *Younger,* a three-judge court was convened. The issues presented were not only the constitutionality on the statutes on their face, but also whether they were being enforced in bad faith. The court denied a temporary restraining order and after later submission of the case upon affidavits and parts of the criminal

trial transcripts denied, by written decision, the claims. (See *Carrillo* file or page 388, *et seq.* for the Judgment and Appendix 1. The *Carrillo* plaintiffs appealed to the United States Supreme Court, but after their request for a preliminary injunction was denied, allowed the appeal to lapse. In *Carrillo*, plaintiffs had never sought damages. Hayakawa was a defendant in the *Carrillo* action.

In *Carrillo*, the Public Defender filed an affidavit claiming to represent 400 of those arrested and later filed an amicus brief. (See Appendix 2) Other attorneys representing defendants also filed briefs or affidavits (See Appendix 3).

This present suit was filed on March 21, 1972, more than three years after the arrests (C.T. 1). It did not allege anything about these arrests (C.T. 1, *et seq.*) A First Amended Complaint was filed August 5, 1972. This also does not mention the mass arrest (C.T. 32, *et seq.*). The mass arrest *is* alleged in the Second Amended Complaint, February 19, 1975 (C.T. 217), six years after the arrests in question.

The court granted our motion for summary judgment as to the First Cause of Action—the mass arrest—by written order (C.T. 439, *et seq.*) on two alternate grounds —*res judicata* and the Statute of Limitations. The Ninth Circuit affirmed but considered only the res judicata ground.

SECOND CAUSE OF ACTION
(PURPORTED BLACKLIST)

In February, 1969, defendant Hayakawa issued a memo, attached to which was the police report of the mass arrest.

Plaintiffs allege this was a "blacklist." In the Third Amended Complaint, there were four named plaintiffs on this claim. Three alleged only fears as to future employment, plaintiffs conceded this was not enough and the court properly disregarded them (C.T. 443).

This left Peter Pursley as the only named plaintiff alleging actual loss of employment. The court found his action barred by the Statute of Limitations (C.T. 443).

The crucial facts are these:

(a) Pursley was informed March 12, 1969, he was not employed (Pursley Affidavit—C.T. 433).

(b) This suit was filed more than three years later (C.T. 1), and Pursley was not joined for an additional three years.

(c) Because he was rehired the next semester, no other violation could have occurred. Hayakawa answers to Interrogatory No. 9 (Answers pages 26, lines 12-17) filed September 17, 1973. (Documents 182-185 sent to the Court separately by the Clerk).

The court found the Statute of Limitations was not tolled because Pursley had no administrative remedy himself and that the grievance filed by another did not toll the statute (C.T. 443-444).

The evidence supporting this is in Document 103 (C.T. 438—unsuitable for transmittal). This consisted of an affidavit stating Pursley had no administrative remedy at the time in question. Attached were certain records as to the Pursley matter's chronology.

I

A COURT MAY TAKE JUDICIAL NOTICE OF ITS OWN FILES OR THOSE OF THE DISTRICT COURT

Evidence Rule 201—*Lambert v. Conrad* (9th Cir. 1952) 308 F.2d 571; *St. Paul Fire & Marine Insurance Co. v. Cunningham* (9th Cir. 1958) 257 F.2d 731, 732; and *Stiltner v. Rhay* (9th Cir. 1963) 322 F.2d 314, 316, fn. 6.

II

AS TO THE MASS ARREST (FIRST CAUSE OF ACTION) THE COURT TOOK JUDICIAL NOTICE OF CARMEN CARRILLO ET AL. v. S. I. HAYAKAWA ET AL. NORTHERN DISTRICT OF CALIFORNIA NO. C-50808

In the *Carrillo* case, *supra*, a class action was filed in the Northern District as to the very event here alleged in the first cause of action—plaintiffs therein sought an injunction and declaratory relief that the statutes under which the mass arrest was made were unconstitutional and the subsequent prosecution of these offenses was conducted in bad faith. A three-judge federal court issued a decision finding that the statutes were *not* unconstitutional on their face and further finding that the arrest and subsequent prosecution were being conducted in *good faith*. The court in the *Carrillo* decision did state that the action was filed not only on behalf of the named plaintiffs, but also on behalf of those similarly situated. A reading of part IV of the opinion (p. 9, *et seq.*) clearly shows that plaintiffs simply failed to prove their bad faith allegations on the merits.

We further asked the court to take judicial notice of two other types of material in the *Carrillo* file. The first type is the affidavits submitted by defendants in *Carrillo* and the partial transcripts of the criminal trial. The second type of material is the affidavits submitted by various attorneys who were representing the arrestees in the criminal proceeding. (See Appendix 3) We especially point to the affidavit submitted by the San Francisco Public Defender's office indicating that they were charged with representing about 400 of those arrested and seeking to file an amicus brief therein (March 11, 1969) (See Appendix 2).

III

THE PRINCIPLES OF RES JUDICATA/COLLATERAL ESTOPPEL BAR THE FIRST CAUSE OF ACTION

Federal Rule of Civil Procedure No. 2 provides that in Federal Court there is only one form of action. This abolished the old common law distinction between actions at law and actions at equity. See 2 Moores *Federal Practice* (2nd Ed. No. 206, pp. 378 and 381). Wright *Federal Courts* (2nd Ed. 1970) No. 67; *Ross v. Bernhard* (1970) 396 U.S. 531, 540.

In Federal law there is simply no right to split a cause of action.

The case closest to our own is *Cambist Films, Inc. v. Duggan* (3rd Cir. 1973) 475 F.2d 887. In *Cambist, supra,* the plaintiff had filed a suit for declaratory relief and for an injunction claiming a violation of First Amendment rights and prevailed. The First Amendment right in issue was the seizure of a film without a prior adversary hearing. Plaintiff subsequently filed a new suit for damages.

The Court of Appeals held that even though plaintiff had prevailed in the previous suit:

> "Where a plaintiff has had an opportunity to seek damages in its earlier action, its failure to combine all of its legal claims legal as well as equitable which could have been asserted and concluded in the earlier action is fatal and the county detectives were entitled to a judgment in their favor on the basis of the doctrine of *res judicata*. More, as stated by Prof. Moore where law and equity have been united and the litigant can present all his issues for relief whether legal or equitable, inconsistent, alternative, or hypothetical in a single action, he should be held to have but one cause of action and final judgment on the merits is *res judicata* as to all matters legal and equitable in support or defense of that cause of action. (One day in court is enough.)" "The plaintiff has had its fair day. Two of four principal defendants from the previous suit were named in the instant action. The previous complaint arose out of the same factual contact as the instant complaint." *Cambist, supra,* 890 and 891.

In *Clarke v. Redeker* (9th Cir. 1969) 406 F.2d 883, the court stated, "The judgment is conclusive not only as to matters which were decided, but also as to all matters which might have been decided." (Citations.)

In *Small Business Administration v. Taubman,* 459 F.2d 991, the Ninth Circuit stated:

> "*Res judicata* bars a suit on a cause of action which has been judicially determined on the merits on a prior suit involving the same parties or their privies. *Lawler v. National Screen Service Corp.*, 349 U.S. 322, 326; *Taubman's* counterclaim asserts the same cause of action asserted by his assignor Olympic in the *Colorado* case. Both claims are also in the same

> operative facts both sought to achieve the same objective. It does not matter that *Taubman's* legal theories of "conspiracy" and "joint ventures" between Joseph Newman and Newman Capital differ from the alter ego theory asserted by Olympic in the prior action." *Taubman, supra.*

A juggling of the parties does not change this result *Smith v. Lemon* (9th Cir. 1971) 442 F.2d 1195.

It therefore does appear to be well settled that a final judgment bars any subsequent action between the same parties based on the identical invasion of the same primary right—*McCarthy v. Noreen* (9th Cir. 1967) 370 F.2d 845, 847; *Boys Town v. Welchurch* (9th Cir. 1965) 349 F.2d 576, 578; *Hatchitt v. U.S.* (9th Cir. 1946) 158 F.2d 754, 755, as to all matters which were actually litigated and also as to those matters which *might* have been litigated in the former action. The action applies not only to actual parties but also their privies. *Cream Top Creamery v. Dean Milk* (6th Cir. 1967) 383 F.2d 358, 361.

It is clear from reading *Carrillo* that the court made a determination on the merits. As that decision makes clear, it was thought at that time that where First Amendment rights were alleged, allegations that statutes abridging such rights were void for vagueness, overbroad, or unconstitutional *as applied* stated grounds for a federal court to interevene in state prosecutions, *Dombrowski,* 380 U.S. 479, 490; *Zwickler v. Koota,* 389 U.S. 241. This was, of course, appreciably modified subsequently by *Younger v. Harris,* 401 U.S. 37.

The principle of *res judicata,* therefore, applies since bad faith was specifically involved. Damages could have

been sought, but were not. See also *American Surety Co. v. Baldwin,* 287 U.S. 156; *Baldwin v. Iowa State,* 283 U.S. 522; *McCormick v. Sullivan,* 10 Wheat 192.

The importance in *Carrillo* of the finding of a lack of bad faith is dispositive of the present action. For arrest situations in *Pierson v. Ray,* 386 U.S. 547; *Wood v. Strickland,* 420 U.S. 308; *Scheuer v. Rhodes,* 416 U.S. 232; and *Imbler v. Pachtman,* 424 U.S. 409, this Court has made quite clear that damages do not lie in a Civil Rights action unless the plaintiffs can in fact show bad faith. We submit the plaintiffs had their opportunity and failed to do so.

A short answer to the petition is that this Court has recently itself spoken on these issues in *Montana v. United States* 440 U.S. 147, 153-158 (1979) and *Parklane Hosiery v. Shore* 439 U.S. 322.

In *Montana, supra,* the United States was held bound by principles of collateral estoppel because it was involved in the state court litigation.

In *Parklane Hosiery, supra,* the results of a Securities Exchange Commission proceeding bound Parklane in separate civil actions.

IV

THE ENTIRE PROPOSED CLASS WAS BOUND BY THE PREVIOUS LITIGATION

We think it now clear and readily apparent that those bound by the *Carrillo* decision are in fact precluded by principles of *res judicata* from proceeding on the first cause of action. The next issue is whether the entire group can be considered bound. We respectfully submit that *Carrillo*

established a proper 23(B)(2) class and all were bound thereby regardless of notice.

Federal Rule of Civil Procedure No. 23 governs class actions. Provided that the four requirements listed in 23(A) were met, and obviously they were, a class is properly formed if *any* of the categories—B1, B2, and B3 are met. In this case, category B2 clearly applied and reads "The party opposing the class has acted or refused to act on grounds generally applicable to the class thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." The class was also a proper B1 class in that "the prosecution of separate actions by or against individual members of the class will create a risk of inconsistent or varying adjudication with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." The Advisory Committee report explaining the 1966 amendment to Rule 23 makes quite clear the following rules:

A. That Subdivision B2 would apply unless the appropriate final relief relates exclusively or predominantly to money damages;

B. That in a B1 or B2 class action, the judgment describes the class and need not specify the individual as required in a B3 class action; and

C. That notice to a B1 or B2 class is discretionary with the court and is not required.

Where there is cohesiveness and unity in the class and the representation is effective, *notice tends toward the*

minimum. The Advisory Committee report can be found in 18 U.S. Supreme Court Digest Lawyer's Edition pp. 50 and 52. U.S. Code annotated Title 28 Rule 23 pages 298, 300 and 301-302. In 3(B) Moore's Federal Practice No. 23.55 at 1152, it is stated that:

> "There will be situations where the class is cohesive or where the legal relationship of the members enables one or more to stand in judgment for all and where the representatives are truly representative—a most important fact. In this situation, we suggest that although some notice to the members may be desirable and may be given—a judgment should be *res judicata* to the B1 and B2 situations where the requirements of Rule 23 have been satisfied."

Other than *Montana v. United States,* (1979) 440 U.S. 147, 153-158 the best exposition of the binding effect on a B2 class even when there is not notice is contained in *Liberty Mutual v. Wetzel* (3rd Cir. 1976) 508 F.2d 239.

Cert. Denied 421 U.S. 1011.

In *Aero Jet v. Askew*, 511 F.2d, the court stated at page 719:

> "Under the Federal law of *res judicata* a person may be bound by a judgment even though not a party, if one of the parties to the suit is so closely aligned with his interest as to be his virtual representative."

In *American Pipe v. Utah*, 414 U.S. 538, the court recognized that the old class action rule applied in 1966 was severely and justly criticized as it allowed one way benefits, and that the rule was therefore changed to bind both. Since *Blonder-Tongue v. University Foundation,* 402 U.S.

313, 322, *et seq.*, there is no longer any requirement that there be a mutuality of estoppel.

It has been clearly held that a class may exist despite noncompliance with a formal certification of the class. *Senter v. General Motors* (6th Cir. 1976), 532 F.2d 511, 520-522) citing with approval *Lau v. Nichols* (9th Cir. 1973) 483 F.2d 791, 793, reversed on other grounds 414 U.S. 563; and *Castro v. Beecher* (1st Cir. 1972) 459 F.2d 725, 731. Nor does a prayer for back pay affect the propriety of a B2 class *Pettway v. American Cast Iron Pipe* (5th Cir. 1974) 494 F.2d 211, 258. See also *International Prisoners v. Rizzo* (P.A. 1973) 356 F.Supp. 806; and *Renn v. Smith* (5th Cir. 1969) 410 F.2d 390; wherein it was held that the members of a B2 class were bound by the judgment despite their lack of notice. See also *White v. Beal,* 413 F.Supp. 1141, 1152; and *Wetzel v. Liberty Mutual* (3rd Cir. 1975) 508 F.2d 239, 254-257.

Moreover, we would submit that even under the old concept of privity plaintiffs are essentially foreclosed under the first cause of action for almost the entire class. An examination of the material in *Carrillo* shows most of the attorneys representing the defendants filed affidavits—thereby actively participating in the litigation—in an attempt to obtain the injunctive benefits.

The file in *Carrillo* reflects that the Public Defender's office filed an affidavit and an amicus brief. This declaration dated, March 11, 1969, states that the Public Defender's office was responsible for representing about 400 of the people arrested at the college on the day in question. Given that statement and the affidavits made by the attorneys rep-

resenting most of the other defendants—or so it seems—it is clear that almost the entire class of those arrested was in fact involved through their attorneys in the litigation in *Carrillo*. This is, accordingly, one more reason to give the judgment *res judicata* effect. Even in a B3 class action where notice is required, nonparties were held bound if an attorney on their behalf had participated. See *In Re Antibiotic Anti-trust Cases*, 333 F.Supp. 296 (Southern District New York) affirmed 450 F.2d 1119 (2nd Cir. 1971). See also *Hansberry v. Lee*, 311 U.S. 32, at 42-43; *Sam Fox v. United States*, 366 U.S. 683, 691.

In summary then since the claim for damages could have been made in the initial lawsuit of *Carrillo*, a suit for damages based upon the identical fact situation may not now be considered. Moreover, we submit the entire class was in fact bound by *Carrillo* regardless of whether they had notice or not. In any event given the participation by attorneys for the various defendants, they would be bound under the old concepts of privity. Also since *Carrillo* found for defendant *Hayakawa* on the issue of good or bad faith and bad faith is essential to recovery of damages, we submit we are entitled to summary judgment as to the first cause of action. The essential privity between the defendants was obviously present—though since *Blonder-Tongue, supra,* has now abolished the concepts of mutuality of estoppel, privity is not required for the other defendants to claim the benefits of *Carrillo* themselves. See also *MaChuck Moon v. Dulles* (9th Cir. 1956) 237 F.2d 241, 243.

The supposed lack of certification is not vital. The Ninth Circuit characterized it, in this instance, as a meaningless requirement since all parties in *Carrillo* treated it as a class

action and the decision refers to the fact that the suit was filed on behalf of all those similarly situated. It is difficult to imagine a situation were the "mass arrest" here would not constitute a proper class action. Obviously if plaintiffs had prevailed all criminal proceedings would have been enjoined.

The Seventh Circuit Court of Appeals in *Jimenez v. Weinberger,* (1975) 523 F.2d 689 determined that certificate of class even after a judgment was not crucial in Rule 23(B)(1) or (B)(2) cases. That reasoning is applicable here.

V

JUDGMENT OF THE PLEADINGS AND SUMMARY JUDGMENT IS PROPER BECAUSE THERE ARE NO LEGITIMATE PLAINTIFFS WHO HAVE STATED A CLAIM ON THE SECOND CAUSE OF ACTION

A fair reading of the complaint (paragraphs 44 to 56) shows plaintiffs allege that as a result of the mass arrest, a "blacklist" was prepared. *If* the allegations related only to the initial act, the finding in *Carrillo* that there was no bad faith shown would be dispositive. The fact of "good faith" would extend to cover the act of not employing those who were thought to have acted in violation of law—there is no absolute right to government employment. *Bishop v. Wood* (1976) 426 U.S. 341; *Bd. Regents v. Roth,* 408 U.S. 564; *Bogacki v. Bd. of Supervisors,* 5 Cal.3d 771.

A refusal to hire those thought guilty of criminal acts, especially where good faith via *Carrillo* is conclusively established, would be dispositive.

Plaintiffs, however, have alleged that a list is still effectively in existence. Our approach therefore was to zero in upon the actual plaintiffs and show they had not stated a claim—except as to one whose claim is barred by the Statute of Limitations—and the actual facts.

It is, of course, clear that one cannot be a fit representative unless he is a member of the injured class, *O'Shea v. Littleton* (1974) 414 U.S. 488, and this applies to those whose claims are barred by a Statute of Limitations. *Liberty Mutual v. Wetzel* (3rd Cir. 1976) 508 F.2d 239, 246.

There were four named plaintiffs. Three of them: Daniels, Simmons and Green—alleged (Par. 49) only that their names appear on a blacklist and they "believe they are in jeopardy of being denied future employment." They had thus not shown an injury and lacked standing.

In *Harris v. Younger* (1971) 401 U.S. 37, 41-42, an allegation of fear of criminal prosecution over a First Amendment Right was held not enough.

In *Paul v. Davis* (1976) 424 U.S. 693, the court held that putting a person's name on an "active shoplifters" list, absent loss of employment failed to state a claim under the Civil Rights Law. The Civil Rights Act does not embody the entire body of tort law.

In *Laird v. Tatum* (1972) 408 U.S. 1, 13, the court held that parties investigated by the Army, which developed intelligence files, failed to state an actual claim. The court also held that they lacked standing as by bringing the suit

they *refuted* that they were afraid to exercise their rights. *Laird* (fn. on page 13-14).

See also *Sierra Club v. Morton* (1972) 405 U.S. 727, 738; *Baker v. Carr* (1962) 369 U.S. 186, 204; *Rizzo v. Goode* (1976) 423 U.S. 362, 372; *Greenwood v. Peacock,* 384 U.S. 808; *Griffin v. Breckenridge,* 403 U.S. 88, 101-102 (1972).

We therefore asked judgment as to the three plaintiffs alleging neither actual employment nor actual injury. *Plaintiffs conceded as to them.*

VI

PETER PURSLEY HAS NOT STATED A CLAIM IN THE SECOND CAUSE OF ACTION BECAUSE OF THE STATUTE OF LIMITATIONS AND THE UNDERLYING FACTS

The only remaining plaintiff in the second cause of action would be Peter Pursley. As to him the complaint alleges that he was on the "blacklist"; was an instructor in Fall, 1968; was not rehired for Spring, 1969 because of the "blacklist"; did teach but was not paid (Par. 50, *et seq.*). Since he would be bound by *Carrillo* on the issue of "good faith" absent a civil service right he therefore had no rights of reemployment.

Moreover, since the injury alleged relates to the *Spring* of 1969, his claim is barred by the applicable Statute of Limitations. Absent special provisions (such as those relating to a Title VII action) the applicable Statute of Limitations is determined by reference to *State* law—

there being no Federal rule. *Hanna v. Plummer,* 380 U.S. 460 at 470.

While this action was filed on March 21, 1972, he was not a named plaintiff until December, 1975, six years after the fact. Plaintiff Pursley is therefore barred and there would therefore be *no plaintiffs* who can sue.

Pursley's affidavit on its face claims he was told he was not approved for rehiring on March 12, 1969 (433). The complaint was filed on March 21, 1972—more than three years later.

Plaintiff makes the argument that an "administrative remedy" tolled the Statute. *Pursley, however, did not file a grievance as he had no such right.* (See Garrity's Affidavit—Document 103). A grievance was filed by the Chairman of the Department of Psychology. This, however, was not a remedy available to Pursley nor did he have to exhaust it.

The *Hayakawa* Interrogatories I(F) provided:

> "Whether there existed and/or exist any memorandum/a, letter/s and/or list/s issued by your staff, your office, and/or its representative/s with respect to the ineligibility for college employment of person/s having no affiliation with the college. (i.e., Peter Pursley, Dr. Carlton Goodlet, etc.)"

Plaintiffs now desire to have Pursley considered a full faculty member. This is totally contrary to the facts they impliedly admit. Attached to #103 is correspondence from Dr. Rauch—who did file the grievance. This shows (in the March 10, 1969 memo) Pursley was a graduate student at Stanford.

The chronology from Rauch dated June 3, 1969 shows Pursley was told by Rauch on *February 27*, that he would not be hired because of the arrests.

Finally, the letter of April 11, 1969 from Dollard to Rappe shows his version of the incident.

It is clear that under the initial directive Pursley would not have been hired unless the special committee granted him an exception. It is further clear that Pursley's involvement in an incident on February 14, not only the mass arrest, was the reason Dollard refused him an exception.

We point not only to Dr. Garrity's affidavit, but also Education Code section 24315 adopted in 1975.

This provided for the first time, an administrative remedy for people such as Pursley—*hired for one semester, question of reappointment.* See also former Education Code section 24301.

It is thus clear that at the time in question—1969 Pursley had no administrative remedy.

Prior to this bill even probationary faculty could be terminated by a nonretention decision and there was no administrative remedy available. *Mabey v. Reagan* (9th Cir. 1976) 537 F.2d 1036, 1042-44 and *Andreadis v. Bd. of Trustees* (1976) 59 Cal.App.3d 344.

Plaintiffs are evidently still claiming that because another's grievance was not finally denied until August, the Statute did not run.

It is, however, the supposed *act*—the issuing of the initial memo that started the Statute. In *Collins v. United*

Air Lines, 514 F.2d 594, the Court of Appeals was faced with a similar situation. The stewardess there alleged a "continuing violation" and the Court rejected this theory.

The above, of course, does not affect the independent ground that "good faith" having been proved in *Carrillo*, Pursley cannot object to the initial memo; having been hired the *very next* semester.

In summary then appellant agreed that three named plaintiffs have not stated a case. As to Mr. Pursley, *Carrillo* prevents an initial finding of bad faith and the Statute—three years has run.

We think in justice that appellants should not be allowed to try again. The arrest in question occurred in January, 1969—when Max Rafferty, Lt. Governor Reinecke and Governor Reagan were in office; Mr. Lynch was Attorney General and Hayakawa had not yet retired and gone to the United States Senate. A true insight into the change of circumstances is that Richard Nixon had only just become President.

A new class action does no one any favors. In *Mount Healthy v. Doyle* (1977) 429 U.S. 274, the Supreme Court has made it quite clear that the exercise of even a First Amendment right should not place one in a better position than we would have been without it. Thus, *even if* First Amendment conduct played a substantial part in a decision, if the decision would have been made anyway there is no relief due. The Court envisions a procedure where a party proves protected First Amendment conduct played a substantial part; the agency can show it would have

acted in any event. The issue is contemplated to be raised in *individual* cases, not as a useless exercise in futility.

As a second independent ground for summary judgment we incorporated our Answers to Interrogatory No. 9 (Answers p. 26, lines 12-17) Hayakawa filed September 17, 1973. This shows he *was* employed for the *Fall Semester* of 1969. There could hardly have been a blacklist as to him as he was hired. On the decision in *Spring* 1969, he would be bound by the "good faith" finding of *Carrillo* and the Statute of Limitations.

A third ground for the nonexistence of a "blacklist" exists in Hayakawa's Answer to Interrogatory (Hayakawa p. 1[illegible] filed September 17, 1973). This refers to Exhibit 3 attached thereto. This shows a number of people from the "blacklist" were hired *after* the effective date thereof.

VII

SUMMARY JUDGMENT WAS PROPER AS TO THE FIFTH CAUSE OF ACTION—STUDENT BUDGET

The order as to the issue was as follows:

"The fifth claim is brought by various individual plaintiffs, and alleges that the Black Students Union (BSU), because it was active in the campus activities of 1969-1970, was budgeted inadequate funds to pay the salaries of all those it had hired. Respondents have shown that i) the demands for money by various groups exceeded available funds; ii) that various minority groups, including the BSU, received funds; and iii) that the BSU received much more than most groups, and in fact received a disproportionately large share of available funds. Accordingly,

there is no evidence that the BSU, which received proportionately more funding than it would be entitled to, was subject to discrimination in budgeting, regardless of what its "expectations" might have been and what promises might have been made. (CT 447.)"

The evidence fully supporting these statements is contained in the Answer of Harkness and Deland (Documents 182 to 184 transmitted separately by the Clerk). The details are in voluminous record exhibits.

The basic thrust of our motion was that the mere expectancy of a benefit to which a plaintiff is not entitled cannot create a cause of action *regardless of motivation,* on the facts alleged here.

Plaintiffs complaint (#90) admits that Black Students Union received an appropriation approved by Hayakawa. The allegation is that *but for his motivation,* they would have received more.

The exhibits attached to Interrogatories show how many political and ethnic groups existed at San Francisco State and that most received Student Funds. Hayakawa could, under plaintiffs theory, be liable to each group and those expecting benefits from it upon the mere allegation that he had an evil motive.

If plaintiffs have stated a cause of action consider the consequences:

(a) City of San Francisco Public Works is sued for failure to fix streets or lights in Hunter's Point; or Mission; or Fillmore; or Chinatown, where sufficient money *was* used but allegation is *more* would have been spent but for racial motive;

(b) State Scholarship Commission is sued where funds are advanced to minorities *but* allegation in that *more* would have been advanced but for racial motive;

(c) H.U.D. makes local grant for Hunter's Point but is sued on allegations that, but for racial motive, more would have been appropriated.

Since every political and racial minority can file and, caucasians can allege reverse discrimination, if plaintiffs succeed, *every* person may sue on whatever he may dislike merely alleging race, religion, or a decision based on exercise of First Amendment violations.

We submit therefore that the underlying purposes behind the "immunity," "political question," and "standing" rules are based at preventing the very type of complaint filed here. Every governmental official could, under plaintiffs theory, be assured of a civil rights suit by the dissatisfied party.

What plaintiffs are really now contending is that Hayakawa denied a *preference* based on race for a racial motive. The simple answer is that plaintiffs had no right to a racial preference. Hayakawa *approved* the sum of $3,500.00 —much more than others received—for the Black Students Union. The next entry is their tutorial program. This received $7,500.00. Given these sums summary judgment was correctly granted.

Education Code section 24053.7 gave to the President power over student appropriations and expenditures. This was enacted mainly because of the profligate diversions of

funds at San Francisco State to a small group of radicals in the form of grants in aid.

Associated Students v. Trustees (1976) 56 Cal.App.3d 667, recognizes the President's broad power.

The case makes clear that the defendants had both the right and duty to insist money be spent properly *and* expended when necessary.

Plaintiffs allege that in refusing to permit student funds to be spent for their comfort and support, Hayakawa somehow discriminated against them. We submit they are not entitled to special favors. They are not entitled to appropriate for their own use funds extracted from others for the benefit of all.

It is difficult to attack the foundation of an argument which rests upon nothing in the record. The "affidavits" so often referred to by petitioner *were not before the Courts below*. They had initially been attached to the initial complaint, but the complaint had been dismissed and the affidavits were ordered *not to be used* as part of any amended complaint. (C.T. 49). No reference was made to them before the District Court and no reference before the Ninth Circuit—they were not only *not* part of the record on appeal but also *not* even mentioned in appellants briefs before the Ninth Circuit.

In *Butz v. Economou,* 438 U.S. 478, 508 this Court decided, by a 5-4 vote, absolute immunity was not required for high level federal officials. Part of the rationale was that a lower court would grant summary judgments and that plaintiffs could not play "dog in the manger."

We submit that our statistical data showing so much having been paid shifted the burden of proof to the plaintiffs. *Bd. Education v. Roberts,* 48 L.Week 4035, 4041 (Nov. 28, 1979) and that plaintiffs failed to challenge this evidence before the District Court or the Court of Appeals. Plaintiffs attempt to create a factual conflict only before this Court itself.

CONCLUSION

We respectfully submit the petition for certiorari should be denied.

Dated: March 10, 1980

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(Appendices Follow)

Appendices

Appendix A

In the United States District Court
for the Northern District of California

No. 50808

Carmen Carrillo, James P. Queen, Regino S. Montes, Gary F. Barr, D. Joseph Beresford, Joshua Leeds through Sharon Leeds, his guardian ad litem, and on behalf of all others similarly situated,

Plaintiffs,

vs.

S. I. Hayakawa, Acting President of San Francisco State College, individually and in his official capacity; Thomas J. Cahill, individually and as Chief of Police of the City and County of San Francisco; and John J. Ferdon, individually and in his official capacity as District Attorney of the City and County of San Francisco, and their agents, employees, and successors in office,

Defendants.

[Filed June 27, 1969]

MEMORANDUM AND ORDER FOR JUDGMENT

WEIGEL, J.

This case arises out of the turmoil at San Francisco State College last winter. For many weeks, students, fac-

ulty members and others organized rallies, conducted demonstration and picketed on or near the campus. These activities were pursued in support of demands for various changes in college programs and policies. Campus life was disrupted. Police were often called. Arrests and threats of arrest were frequent. Property damage and violence punctuated the turmoil.

The plaintiffs, who sue on behalf of themselves and others similarly situated, were arrested during the course of these troubles. They complain particularly of the mass arrest on January 23, 1969. On that date, many people gathered for a rally on the campus commons in disregard of orders issued by defendant Hayakawa, the Acting President of the college. The authorities announced to those assembled that they were participating in an unlawful assembly and ordered them to disperse. Shortly thereafter members of the San Francisco Police Department encircled and arrested approximately 450 persons. Those arrested were charged with violating California Penal Code § 408 (participation in an unlawful assembly or rout), § 409 (refusal to disperse from the place of an unlawful assembly, rout or riot), and § 415 (disturbing the peace). An "unlawful assembly" is defined by § 407. Expedited prosecutions are proceeding in the state and city courts.

The complaint herein seeks a declaratory judgment striking down California Penal Code §§ 407, 408, 409 and 415 as unconstitutional on their face or a declaratory judgment holding that those statutes and others have been enforced unconstitutionally for the purpose and with the effect of discouraging free speech and assembly. Plain-

tiffs also seek preliminary and permanent injunctions restraining the defendants from enforcing both the challenged statutes and certain college regulations as well as from interfering with the exercise of various claimed constitutional rights.

The attack on the wording of the statutes focuses on the following language:

> § 407. Whenever two or more persons assemble together to do an unlawful act . . . or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly.
>
> § 415. Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct . . . is guilty of a misdemeanor, . . .

Plaintiffs urge that the quoted provisions are unconstitutionally vague and overbroad in that they proscribe activities protected by the Fourteenth Amendment as it "incorporates" the First.

Plaintiffs properly rely upon 28 U.S.C. §§ 1343(3), (4) as giving this court jurisdiction over the suit they bring under the sanction of 42 U.S.C. § 1983. On March 14, 1969, this three-judge court, convened pursuant to 28 U.S.C. §§ 2281, 2284, denied a motion for a temporary order restraining the prosecution of plaintiffs, and members of their class on charges arising out of the January 23 arrests. The plaintiffs have now moved for a declaratory judgment that the state penal statutes are unconstitutional on their face, a declaratory judgment that said statutes have been applied in bad faith for the purpose and with the effect of discouraging the exercise of the rights of speech and assem-

bly, and a declaratory judgment that certain regulations promulgated by defendant Hayakawa are unconstitutional restrictions of constitutional rights. If any or all said judgments should be granted, plaintiffs also seek a preliminary injunction against various types of harassment, arrests, and prosecutions.

I.

Defendants urge the court to abstain in this matter on the ground that those prosecuted under state penal statutes should first seek protection of their constitutional rights in the state courts.[1] We decline to abstain. *See Davis v. Francois,* 395 F.2d 730, 732 (5th Cir. 1968); *Heard v. Rizzo,* 281 F. Supp. 720, 728, 738 (E.D. Pa.), *aff'd,* 392 U.S. 646 (1968); *Landry v. Daley,* 280 F. Supp. 938, 946-49 (N.D. Ill.), *prob. juris. noted sub nom. Boyle v. Landry,* 393 U.S. 974 (1968) (No. 244); *appeal on other question dismissed sub nom. Landry v. Boyle,* 37 U.S.L.W. 3208 (U.S. Dec. 10, 1968).

"Civil rights" are particularly deserving of prompt protection by the federal courts. *See McNeese v. Board of Education,* 373 U.S. 668, 671-72 (1963). Abstention is disfavored in cases justifiably attacking state statutes as being unconstitutionally "vague" or "overbroad" regulations of First Amendment freedoms. *See Dombrowski v. Pfister,* 380 U.S. 479 (1965); *Zwickler v. Koota,* 389 U.S. 241 (1967). While the attacks made by plaintiffs on the California statutes may not prevail, they raise serious questions which merit consideration. The challenged statutes appear on their face to deal with speech and assembly in sweeping terms. Similar statutes and ordinances have been declared unconstitutional by other three-judge courts on grounds urged by plaintiffs here. *University Comm. to End the War in Viet Nam v. Gunn,* 289 F. Supp. 469 (W.D. Tex.), *prob. juris. noted,* 393 U.S. 819 (1968); *Landry v. Daley, supra,* at 955; *Carmichael v. Allen,* 267 F. Supp. 985, 997-98 (N.D. Ga. 1967). Affidavits submitted by the plaintiffs indicate that the expression of opinions on the campus of San Francisco State College may have been inhibited by the vigorous enforcement of the challenged statutes.

[1]For a thorough analysis of the abstention doctrine, *see* Note; *Federal Question Abstention: Justice Frankfurter's Doctrine in an Activist Era,* 80 HARV. L. REV. 604 (1967).

These factors are not outweighed in this case by considerations normally favoring abstention—considerations such as leaving state law questions to state courts, avoiding unnecessary or premature decisions on the constitutionality of state statutes and minimizing conflict between state and federal governments. *Compare Dombrowski, supra, and Zwickler, supra, with Railroad Comm'n v. Pullman,* 312 U.S. 496 (1941). Therefore, we proceed to consider the merits of the plaintiffs' motions.

II.

Section 407 of the California Penal Code defines two circumstances constituting an "unlawful assembly": assembling "to do an unlawful act" and assembling "to do a lawful act in a violent, boisterous, or tumultuous manner." As to the former, the plaintiffs contend that the term "unlawful act" encompasses the gamut of criminal *and civil* wrongs and, therefore, is both overbroad and susceptible of arbitrary enforcement. This was the ground for holding an almost identical statute unconstitutional in *Lan-*

dry v. Daley, supra, at 955. That court felt that " 'unlawful act' in its normal meaning . . . includes city regulatory ordinances, quasi-criminal ordinances, torts and other civil wrongs." *Id.*

We cannot agree. In the context of § 407, we are satisfied that "unlawful act" refers to criminal conduct prohibited by state law and that the average reader would so understand. This is the only interpretation given that phrase by the California state courts. *See Coverstone v. Davies,* 38 Cal. 2d 315, 239 P.2d 876 (1952) ("hot-rod" racing punishable by both fine and imprisonment); *In re Bacon,* 240 Cal. App. 34, 49 Cal. Rptr. 322 (Dist. Ct. App. 1966) (illegal occupation of a college building); *People v. Anderson,* 117 Cal. App. 2d 763 (Super. Ct., App. Dep't 1931) (obstruction of public traffic). Construed in this manner, the first part of § 407 is neither "vague" nor overbroad nor unduly susceptible of arbitrary enforcement.

Plaintiffs' second attack on § 407 focuses on its prohibition against doing lawful acts in a "boisterous" or "tumultuous" manner. Although on its face such language may raise constitutional questions, *see, e.g., Carmichael v. Allen, supra,* at 998, this portion of the statute has been construed in a manner which comports with constitutional standards. In *People v. Kerrick,* 86 Cal. App. 542, 551-52, 261 P. 756, 759-60 (Dist. Ct. App. 1927), referring to § 407, the state court held:

> Not every meeting where violent, boisterous and tumultuous conduct occurs may be denominated an unlawful assembly. . . . The statute was intended to prevent "any tumultuous disturbance of the public peace by" two or more persons "having no avowed,

> ostensible legal or constitutional object assembled under such circumstances and deporting themselves as to produce danger to the public peace and tranquillity, *and* which excites terror, alarm *and* consternation in the neighborhood."
>
> (ciations omitted; emphasis added).

The court further specified that within the meaning of the statute, "terror" arises when

> "rational and firm men, in charge of families, would have, under the circumstances, cause for anxiety, and in testing this it is necessary to take into account the hour at which the parties meet, the language used by them, and the acts done."
>
> *Id.* (citation omitted).

The referenced language of § 407 purports to reach *only* those assemblies characterized by "violent, boisterous, or tumultuous conduct". It does not interfere with any peaceful gathering simply because it may develop into or precipitate a public commotion. *Kerrick* narrowly defined the illegality of any such assembly in terms of *both* purpose *and* effect. Thus, the statute reaches only those assemblies which are outwardly unruly and which, without any professed or apparent legal objective, excite fear and unrest in the community. Such an interpretation brings § 407 within constitutional bounds.

The finding that § 407 is constitutional makes it unnecessary to examine §§ 408 and 409 because the attack on those statutes was based upon the alleged unconstitutionality of § 407.

III.

The challenge to § 415 of the California Penal Code is aimed at the language:

> Every person who maliciously and willfully disturbs the peace or quiet of any neighborhood or person, by loud or unusual noise, or by tumultuous or offensive conduct . . . is guilty of a misdemeanor. . . .[2]

Plaintiffs urge that this provision is unconstitutionally "vague" in that it does not delineate an ascertainable standard of conduct and is impermissibly "overbroad" in that it embraces forms of expression which are constitutionally protected. Therefore, they contend, that portion of §415 is void *per se*.

In recent years, similar codifications of common law "breach of the peace" and "disturbing the peace" doctrines have been under steady siege, both successfully, *e.g., University Committee to End the War in Viet Nam v. Gunn, supra,* and unsuccessfully, *e.g., Heard v. Rizzo, supra.* The question raised is a difficult one. The state clearly has a legitimate need for a "catch-all" statute prohibiting those excesses of behavior which cannot be predicted and proscribed with particularity. Yet, such a provision by its very nature regulates certain forms of speech and assembly in sweeping and indefinite terms. The Supreme Court has occasionally found such statutes unconstitutional *as applied* to peaceful activities, but it has not clearly ruled on whether they are facially unconstitutional under due

[2]"Maliciously" is defined by § 7(4) of the Penal Code as importing "a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law."

process standards. *See Brown v. Louisiana,* 383 U.S. 131 (1966); *Cox v. Louisiana,* 379 U.S. 536 (1965); *Edwards v. South Carolina,* 372 U.S. 229 (1963); *Cantwell v. Connecticut,* 310 U.S. 296 (1940); Note *Regulation of Demonstrations,* 80 HARV. L. REV. 1773, 1783 (1967).

We believe that the proper approach to this question is that outlined by Mr. Justice Harlan in his concurring opinion in *Garner v. Louisiana,* 368 U.S. 157, 185 (1961):

> No one can deny the interest that a State has in preserving peace and harmony within its borders. Pursuant to this interest, a state legislature may enact . . . a disturbance of the peace statute which either lists in detail the acts condemned by legitimate state policy or proscribes breaches of the peace generally, thus relating the offense to the already developed body of common law defining that crime. Or it may . . . append to a specific enumeration in a breach of the peace statute a "catch-all" clause to provide for unforeseen but obviously disruptive and offensive behavior which cannot be justified, and which is not within the range of constitutional protection.
>
> But when a State seeks to subject to criminal sanctions conduct which, except for a demonstrated paramount state interest, would be within the range of freedom of expression as assured by the Fourteenth Amendment, it cannot do so by means of a general and all-inclusive breach of the peace prohibition. It must bring the activity sought to be proscribed within the ambit of a statute or clause "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State." *Cantwell v. Conn., supra,* at 311; *Thornhill v. Alabama,* 310 U.S. 88, 105. 368 U.S. at 202-03.

Thus, broad "breach of the peace" statutes of reasonable construction are not unconstitutional *on their face.* However, they may well be unconstitutional *as applied* even though the activity to which they are applied might be constitutionally proscribed by a specific statute enacted in support of an overriding state interest.

Examining California Penal Code § 415 with this framework in mind, we find that section to be a reasonable legislative provision protecting the public from unforeseeable and unwarranted intrusions into the peaceful and orderly conduct of its affairs. *See United States v. Woodard,* 376 F.2d 136, 140-41 (7th Cir. 1967). State appellate decisions interpreting § 415 have upheld its application only in such circumstances. *See Chrisman v. Culinary Workers' Local 62,* 46 Cal. App. 2d 129, 115 P.2d 553 (Dist. Ct. App. 1941); *People v. Green,* 234 Cal. App. 2d Supp. 871, 44 Cal. Rptr. 438 (Super. Ct. App. Dep't 1965), *cert. den.,* 382 U.S. 993 (1966); *People v. Vaughn,* 65 Cal. App. 2d Supp. 844, 150 P.2d 964 (Super. Ct., App. Dep't 1944); *People v. Anderson,* 117 Cal. App. 763, 1 P.2d 64 (Super. Ct., App. Dep't 1931). We conclude that § 415 is not unconstitutional on its face.

We so hold only on the basis that § 415 is the kind of "catch-all" found permissible by Mr. Justice Harlan in his concurring opinion in *Garner, supra.* To make this perfectly clear: § 415 cannot be employed by the state to punish exercises of the right of freedom of speech guaranteed by the First Amendment through the Fourteenth. Some very limited restrictions on that right may be reached by a narrowly drawn statute embodying a legislative judgment that they are necessary to protect the community against clear and present danger. *Garner, supra,* at 202-03 (Harlan, J., concurring), *see Cantwell v. Connecticut, supra,* at 311. No such statute is here before us.

IV.

As noted earlier, plaintiffs also move for a declaratory judgment that §§ 408, 409 and 415 have been applied without just cause for the purpose and with the effect of discouraging the exercise of free speech and assembly. There is no evidence in the record plainly establishing abusive invocation of the state criminal laws for such purposes. Although some plaintiffs have submitted affidavits making such allegations and claiming a "chilling" of their First Amendment rights, those declarations have been controverted by the defendants. The record is insufficient to warrant the granting of such relief.

Plaintiffs further seek a declaratory judgment that various regulations issued by defendant Hayakawa are invalid under the First and Fourteenth Amendments. These regulations prohibited the use of the central campus for rallies or other public events likely to disturb classes and studying. Since the filing of the complaint, however, these restrictions have been rescinded. Thus, this portion of the plaintiffs' motion is moot.

For the reasons expressed in denying any declaratory relief in this matter, we also deny the plaintiffs' request for a preliminary injunction.

V.

It is important to reiterate that our decisions on the narrow issues here before the Court do not sanction any inroad whatever by any person or persons whatever in any manner whatever upon the Constitutional rights of free speech and assembly. In these times, when issues of critical importance provoke discussion and disagreement —especially on our campuses—it is important to bear in mind what the Supreme Court said in *Terminiello v. Chicago,* 337 U.S. 1, 4-5 (1948), and reiterated in *Edwards, supra,* at 237-38, and *Cox, supra* at 551-52:

> [A] function of free speech under our system of government is to invite dispute. It may best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.

(Citations omitted).

In accordance with the conclusions reached earlier in this opinion, it is hereby ordered that the motions for declaratory judgment and injunctive relief are denied and that judgment for the defendants be entered.

Dated: June 27, 1969.

/s/ M. Oliver Koelsch
Circuit Judge

/s/ William T. Sweigert
District Judge

/s/ Stanley A. Weigel
District Judge

Appendix B

Edward T. Mancuso
Public Defender
By: Charles G. Warner
Deputy Public Defender
850 Bryant Street, Room 205
San Francisco, California 94103
553-1671

In the United States District Court
for the Northern District of California

No. 50808

Carmen Carillo, et al.,
Plaintiffs,

vs.

S. I. Hayakawa, et al.,
Defendants.

DECLARATION OF CHARLES G. WARNER

Charles G. Warner, declare under penalty of perjury, as follows:

That he is a Deputy Public Defender for the City and County of San Francisco. That in this capacity he has been charged with the responsibility of assisting in the defense of persons arrested on the campus of San Francisco State College on January 23, 1969; that the Office of the Public Defender represents in excess of 400 of said persons arrested on misdemeanor charges in the Municipal Court for the City and County of San Francisco.

That it is your declarant's opinion that all clients represented by this Office are members of the same class as plaintiffs herein within the meaning of the Federal Rules of Criminal Procedure, and that the trials of these matters should be permanently enjoined for the reasons set forth in plaintiffs' complaint. Furthermore, this Office has requested the District Attorney for the City and County of San Francisco to continue the prosecutions of these matters until this Court adjudicates the instant law suit, but the District Attorney has refused to do so.

WHEREFORE, your declarant respectfully requests that he be allowed to file the attached Memorandum of Points and Authorities and that petitioners be granted the relief prayed for in their complaint.

DATED: March 11, 1969

EDWARD T. MANCUSO
Public Defender

By: /s/ CHARLES G. WARNER
Charles G. Warner
Deputy Public Defender

Edward T. Mancuso
Public Defender
By Charles G. Warner
Deputy Public Defender
850 Bryant Street
San Francisco, California
553-1671

In the United States District Court for
the Northern District of California

No. 50808

Carmen Carillo, et al.,
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Defendants.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE RELIEF REQUESTED IN PLAINTIFFS COMPLAINT ON FILE HEREIN.

I

DEFENDANTS CANNOT BE CONVICTED OF SECTIONS 408, 409 and 415 OF THE PENAL CODE IN THAT THEY WERE ENGAGED IN A CONSTITUTIONALLY PROTECTED ACTIVITY.

It is defendants' contention that they cannot lawfully be convicted of Penal Code Sections 408, 409 and 415 in that they were engaged in a constitutionally protected activity at the time of their arrest. Defendants were exercising their rights of freedom of speech and freedom of assembly guaranteed to them under the First Amendment

to the United States Constitution. The First Amendment is made applicable to the states through the Fourteenth Amendment to the Constitution. *Gitlow v. New York,* 268 U.S. 652 (1925).

In *Edwards v. South Carolina,* 372 U.S. 229 (1963) the United States Supreme Court reversed convictions from South Carolina courts for disturbing the peace stating that "the

* * * *

Appendix C

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Andrew Cohen
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In the United States District Court for
the Northern District of California

Civil Action No. 50808

Carmen Carillo, et al.,
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vs.

S. I. Hayakawa, et al.,
Defendants.

[Filed May 7, 1969]

DECLARATION UNDER PENALTY OF PERJURY

We, Richard M. Sims, III, and Charles G. Warner, declare under penalty of perjury that the following statements are true to the best of our knowledge:

We were attorneys of record for Frank Alvarado, Carl Butz, Benjamin Cavanaugh, Ernest Brill, Connie Brozicevic and Laureen Chew, who were arrested on January 23, 1969 and charged with violating Sections 408, 409 and 415 of the California Penal Code.

At the trial of the above charges, which occurred from March 24, 1969 to April 17, 1969 in the Municipal Court of the City and County of San Francisco, the prosecution relied on the following witnesses:

(1) Captain George Emil of the S.F. Police Department;

(2) Sergeant Edward Epting of the S.F. Police Department;

(3) Officer William Pacheco of the S.F. Police Department;

(4) Officer John Mahoney of the S.F. Police Department;

(5) Officer John Sully of the S.F. Police Department;

* * * *

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[Filed May 7, 1969]

AFFIDAVIT

I Stephen Arian, being duly sworn depose and say I am the attorney of record for the following named individuals:

George A. Bigham

Gerard R. DeSegur

Sandra E. Drake

Ronald Lee Gracia

Charles S. Crank

Don Q. Griffin

Edward G. Ilumin

Matsuo Furuyama

The above-named were arrested on January 23, 1969 and charged with violation of the California State Penal Code § 408, § 409 and § 415.

The matter came to trial on March 24, 1969 in Department 8 of the Municipal Court in and for the City and County of San Francisco, State of California, the Honorable Gerard J. Ogara presiding. Jury trial continued until April 16, 1969 at which time the Jury returned a verdict of not guilty as to each defendant and on each count.

At the trial of this matter the prosecution offered physic

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Carmen Carillo, et al.,
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Defendants.

[Filed May 7, 1969]

AFFIDAVIT

City and County of San Francisco
State of California } ss.

Stewart Weinberg, being first duly sworn, deposes and says:

That along with Claude Perasso of the Public Defender's Office of the City and County of San Francisco, he represented six persons who were arrested on January 23, 1969, and charged in the City and County of San Francisco Municipal Court with violation of California Penal Code sections 408, 409 and 415. Stewart Weinberg represented Linda Schuman; Jeffery Friedman represented Rosemary

Romero, and Claude Perasso represented James Queen, Charles Seeman, Megume Shimizu and Heide Smith.

At the trial which occurred from March 24, 1969 to April 14, 1969, evidence was presented that these defendants were present at an assembly which was boisterous, tumultuous and disturbed the peace of

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[Filed May 7, 1969]

AFFIDAVIT

I, Stephen C. Johnson, being duly sworn depose and say I was the attorney for Stephen Canwright, Cheryl Morrow, Juanita Boles, and Michael Blaine, who were arrested on January 23, 1969, and charged in the Municipal Court of CCSF, State of California with violations of Cal. P. C. 408, 409 and 415.

At the trial which occurred from March 24, 1969 to May 1, 1969, the evidence introduced by the prosecution as indicating that these particular defendants engaged in the acts complained of fell into two distinct categories: 1) evidence relating to the actions of the particular defendants; and 2) evidence not connected with the defendants, but allowed in on various grounds including the conduct and character of the rally held on January 23, 1969, evidence of conduct of others occurring before the rally on said date, and after the arrest of defendants on January 23, 1969, and evidence of violence

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[Filed May , 1969]

AFFIDAVIT

I, James N. Penrod, being duly sworn depose and say I was the attorney for Regino Montes, Thomas D. Maxey, Leonard J. Mudavahnu, Diane Moore, Michael O'Callaghan, Jacqueline Quinn, Marilyn Uran, and Ruth Pine, who were arrested on January 23, 1969, and charged in the Municipal Court of CCSF, State of California, with violations of Cal. P. C. 408, 409, and 415.

At the trial which occurred from March 24, 1969 to April 2, 1969, the following types of evidence were introduced:

1. There was no evidence of any violence occurring before or during the rally at which these defendants were arrested. There was evidence of the presence of nine pool balls in a crowd, estimated by police witnesses to be about 1200, most of which were known by police witnesses to be in the possession of one man who, it was testified, in no way resembled the above defendants. There was also

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